TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 148.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

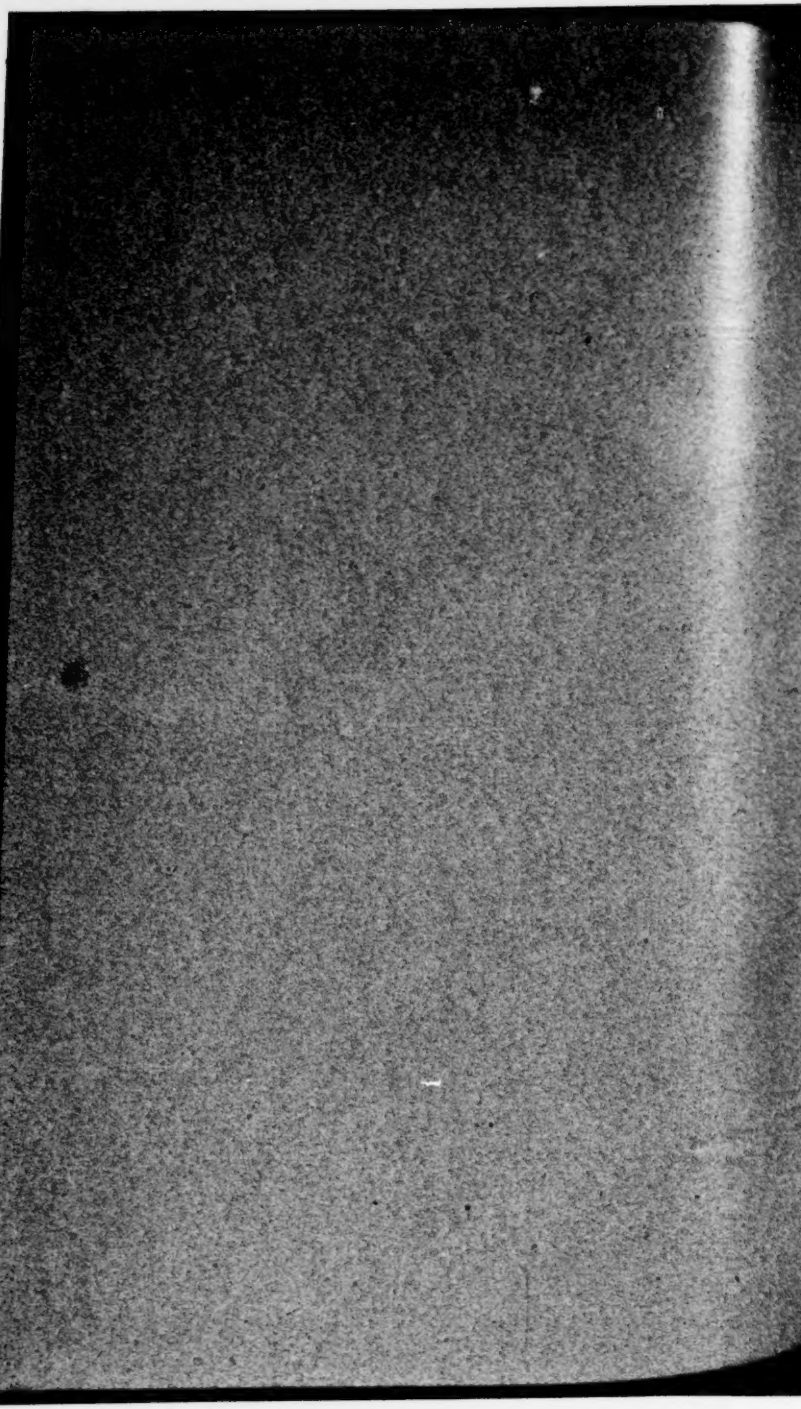
vs.

JOHN S. ELLIOTT.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS FOR THE STATE OF MISSOURI.

FILED AUGUST 25, 1900.

(17,889.)



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a In the Kansas City Court of Appeals.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. 5065.

Certified Copy of Record.

b STATE OF MISSOURI, } ss:
County of Jackson, }

In the Kansas City Court of Appeals of the State of Missouri.

Be it remembered that heretofore there was pending in the above-entitled court a cause entitled John S. Elliott, respondent, against Missouri, Kansas & Texas Railway Company, appellant, the same being an appeal from the circuit court of Cooper county, in the State of Missouri, in which the following proceedings were duly had, as provided by law, at the respective dates mentioned, to wit:

c On February 21st, 1898, the appellant filed in the office of the clerk of the Kansas City court of appeals a transcript of judgment and order granting an appeal in said case from the circuit court of Cooper county, Missouri, in words and figures as follows, to wit:

d Be it remembered that at the regular October term, 1897, of the circuit court of Cooper county, Missouri, and on the 6th day of December, 1897, it being the 24th day of said term, the following among other proceedings were had, to wit:

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY. }

Now at this day come the parties hereto by their respective attorneys, and waiving a jury, submit the cause to the court upon the pleadings and proof adduced, and the court being fully advised doth find the issues for the plaintiff and against the defendant, and doth assess his damages at the sum of two thousand ($2,000) dollars. It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the damages assessed, to wit: two thousand dollars, together with his costs and charges in this behalf expended, and have execution therefor.

e And afterwards, to wit: at said term of said court, and on the said 6th day of December, 1897, it being the 24th day of said term, the following other proceedings were had, to wit:

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Now at this day comes the defendant by its attorney and files its affidavit and bond for appeal herein, and said bond is by the court approved, and an appeal granted said defendant to the Kansas City court of appeals.

f And afterwards, on August 30th, 1898, the said appellant filed in the said Kansas City court of appeals a printed record of the proceedings in said cause in the said circuit court of Cooper county, Missouri, in words and figures as follows, to wit:

g In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Appellant. } No. —.

Appeal from Cooper circuit court.

Record.

Geo. P. B. Jackson, attorney for appellant.

1 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Appellant. } No. —.

Appeal from Cooper circuit court.

Record.

This is an action to recover $2,000.00 as damages on an injunction bond given in a suit in the U. S. circuit court for the central division of the western district of Missouri.

2 The plaintiff filed the following

Petition.

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

JOHN S. ELLIOTT, Plaintiff,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Plaintiff states that the defendant is now and was at the times hereinafter stated a corporation duly created and organized according to law.

Plaintiff further states that heretofore, to wit, on the 29th day of November, 1893, there was pending in the circuit court of the United States for the central division of the western district of Missouri a suit instituted by this plaintiff against the defendant herein to recover from said defendant a large sum of money, to wit: thirty-six thousand seven hundred and fifty-nine dollars and seventy-three cents ($36,759.73), for railroad ties furnished the said defendant by the plaintiff; that the defendant herein instituted its suit in equity in said court to obtain an injunction against the plaintiff to restrain
3 the prosecution of said suit against it, and that such proceedings were had therein, that a temporary injunction was granted upon the execution by the defendant together with E. C. Simmons and William Nicholls as its sureties of a bond, a certified copy of which is herewith filed, that the defendant by its said bond, acknowledged itself to owe and to be firmly bound in the sum of twenty thousand ($20,000) dollars, unto the plaintiff herein upon condition that whereas the said defendant, The Missouri, Kansas & Texas Railway Company, in a suit in equity instituted by it against the said John S. Elliott, in the circuit court of the United States in the central division of the western district of Missouri, and which is number 2092, has applied for and obtained a temporary injunction, the nature and purpose of which said temporary injunction is to restrain the prosecution of an action at law in which said John Elliott is plaintiff and the said Missouri, Kansas & Texas Railway Company is defendant, now pending in the above-named court and under the number 2082.

Now, if the said Missouri, Kansas & Texas Railway Company will abide the decision which may be made in said case, number 2092, and upon said injunction and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation shall be void, otherwise to remain in full force and effect.

For breach of said bond, the plaintiff assigns the following; that said temporary injunction was dissolved and that the plaintiff
4 in and about the procuring the dissolution of said injunction was put to great trouble and expense and necessarily laid out and expended large sums of money, and incurred liabilities; that he was compelled to spend a great deal of time in procuring and presenting evidence to secure the dissolution of said injunction and employed attorneys to represent him in said matter and incurred large liabilities on account thereof; that his personal expenses in traveling from place to place where evidence was taken in reference to said injunction, and in support of the application therefor, and in going to and returning from the place of trial was, to wit: two hundred ($200) dollars, and that the reasonable value of the services of the plaintiff's attorneys in said matter incurred by the defendant was eighteen hundred ($1,800) dollars, and that plaintiff sustained damages in the sum of two thousand ($2,000) dollars and that the said defendant has failed to pay the same, or any part thereof.

Wherefore plaintiff asks judgment for the penalty of said bond, to wit, the sum of twenty thousand ($20,000) dollars, and that execution

issue for the damages sustained by him, to wit, two thousand ($2,000) dollars, and for costs.

JOHN COSGROVE,
W. M. WILLIAMS,
Attorneys for Plaintiff.

5 Defendant filed the following

Answer.

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

JOHN S. ELLIOTT, Plaintiff,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Now comes the above-named defendant, and, for answer to the plaintiff's petition herein, admits that it was, and is, a corporation organized according to law; that at the times stated in the petition there was pending in the circuit court of the United States for the central division of the western district of Missouri a suit instituted by this plaintiff against this defendant, as alleged in the petition, and that the defendant instituted a suit in equity in said court against the plaintiff, and that in said suit a temporary injunction was granted, and that the defendant, as principal, with E. C. Simmons and William Nichols, as sureties, executed an injunction bond as stated in the petition, but defendant denies that said suit in equity was instituted by this defendant to obtain an injunction
6 against the plaintiff, and defendant alleges that the granting of said injunction was merely an incident to said suit instituted for the main and principal purpose of cancelling and annulling a certain alleged report of inspection of ties, all of which proceeding was necessary to enable this defendant to make its defense in the said United States court to the action instituted by this plaintiff against this defendant as stated in the petition.

Farther answering said petition, this defendant denies each and every other allegation thereof, and, having fully answered, defendant prays to go hence without day, and that it recover its costs in this behalf expended.

GEO. P. B. JACKSON,
Attorney for Defendant.

At the October term, 1897, a trial was had before the court without a jury, when the court rendered the following

Judgment.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Now, at this day, come the parties hereto by their respective attorneys, and waiving a jury, submit the cause to the court upon the pleadings and proof adduced, and the court being fully advised doth find the issues for the plaintiff and against the defendant, and doth assess his damages at the sum of two thousand ($2,000) dollars.

7

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the damages assessed, to wit, two thousand dollars, together with his costs and charges in this behalf expended, and have execution therefor.

In due time the defendant filed motion for new trial which was overruled, and defendant duly appealed the case to this court.

The proceedings at and subsequent to the trial are preserved in the following

Bill of Exceptions.

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

JOHN S. ELLIOTT, Plaintiff,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Be it remembered, that upon the trial of the above-entitled cause at the October term of the Cooper circuit court, it being December 2d, 1897, before the Hon. Dorsey W. Shackleford, judge of said court, the following proceedings were had:

8

Appearances.

John Cosgrove, Esq., and W. M. Williams, Esq., for plaintiff.
Geo. P. B. Jackson, Esq., for defendant.

The plaintiff to sustain the issues upon his part offered evidence as follows, to wit:

H. C. GEISBERG, being duly sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Hand us the papers in the law case in Elliott *v.* M. K. & T. R'y in U. S. circuit court. (Produces papers called for.) And they are offered in evidence.

Q. Now the papers in the equity case that restrains this action of law. (Produces papers.)

Mr. WILLIAMS: We offer in evidence the appeal filed in the equity case of The Missouri, Kansas & Texas Railway Company *v.* John S. Elliott.

Said offer is in words and figures as follows, to wit:

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } No. 2092.

This day comes the defendant, by his solicitor and files a petition for an appeal, with order indorsed thereon, to wit:—

In the United States Circuit Court of Appeals for the Eighth Circuit.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
vs.
JOHN S. ELLIOTT, Respondent. } No. 2092.

The above-named respondent, John S. Elliott, conceiving himself aggrieved by the final decree entered in said court in the above-entitled action on the 21st day of March, 1895, doth hereby appeal from said judgment, order and decree, to the United States circuit court of appeals of the eighth judicial circuit, and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was
10 made, duly authenticated, may be duly sent to the United States circuit court of appeals for the eighth circuit.

JOHN COSGROVE,
W. M. WILLIAMS,
Solicitors for Defendant, John S. Elliott.

Mr. WILLIAMS: We next offer in evidence the order of the court granting the injunction, filed October 25th, 1893.

Said order is in words and figures as follows, to wit:—

In the Circuit Court of the United States in and for the Central Division of the Western District of Missouri, October Term, 1893, Wednesday, October 25th, 1893.

Present: Hon. John F. Philips, judge.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
against
JOHN S. ELLIOTT, Respondent.

Now on this day come the parties hereto by their respective counsel, and the court being fully advised in the premises, it is by the court ordered that respondent herein be enjoined and re-
11 strained from prosecuting his action at law against the complainant herein, the same being case No. 2082 on the law docket of this court, upon condition that the complainant herein,

The Missouri, Kansas & Texas Railway Co., pay the respondent herein, John S. Elliott, on or before the first of December, 1893, the sum of twelve thousand dollars ($12,000.00) and on or before the 1st of December, 1893, enter into a bond payable to the said John S. Elliott, in the penal sum of twenty thousand dollars ($20,000.00) to indemnify the respondent, John S. Elliott, as in the form of bonds for injunction in equity practice, the security to be approved by the clerk of this court; and thereupon, the respondent, by his counsel, files his answer to the complainant's bill; and it is ordered by the court that Shannon C. Douglass be and he is hereby appointed and selected the special master in chancery and the special examiner to take testimony herein. It is further ordered that the special master and examiner complete the taking of testimony on the part of the complainant, on or before the 1st day of January, 1894, and that he complete the taking of testimony on behalf of the respondent on or before the 1st day of February, 1894, and the testimony in rebuttal, if desired thereto, on or before the 16th day of February, 1894. It is further ordered that the matter in controversy be referred to the special master to make his findings upon the questions of fact and his conclusions of law thereon respecting the allegations of the bill and the special defenses thereto, if any be set by
12 the respondent in his answer and make his findings of fact upon all the issues arising in the case, and that he also report his conclusions thereon to this court with all reasonable diligence; and this cause is continued for further orders and proceedings.

JNO. F. PHILLIPS, *Judge*.

Mr. WILLIAMS: I now offer in evidence the bond given in accordance with that order.

Said bond is in words and figures as follows, to wit:

Injunction Bond.

Know all men by these presents; that the undersigned, the Missouri, Kansas and Texas Railway Company, a corporation, as principal, and E. C. Simmons of St. Louis, Mo., and Wm. Nichols, Mo., as sureties are held and firmly bound unto John S. Elliott in the sum of twenty thousand dollars, to the payment whereof we bind ourselves, our successors, heirs and administrators, firmly by these presents.

Signed and sealed this twenty-ninth day of November, 1893.

The condition of the above bond is as follows, to wit:

Whereas, the above-bounden principal, the Missouri, Kansas and Texas Railway Company, in a suit in equity instituted by it against the said John S. Elliott in the circuit court of the United
13 States for the central division of the western district of Missouri, and which is numbered 2092 in said court, has applied for and obtained a temporary injunction, the nature and purpose of which said temporary injunction is to restrain the prosecution of an action at law, in which the said John S. Elliott is plaintiff and the said Missouri, Kansas — Railway Company is defendant, now pending in the above-named court and under the number 2082.

Now, if the said Missouri, Kansas & Texas Railway Company, will abide the decision which may be made in said case, number 2092, and upon said injunction and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation will be void, otherwise to remain in full force and effect.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
By THOS. C. PURDY, [SEAL.]
Vice-President and General Manager.
W. NICHOLS. [SEAL.]
E. C. SIMMONS. [SEAL.]

The sureties in this bond approved, this first day of December, A. D. 1893.

H. C. GEISBERG, *Clerk.*

14 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, W. Nichols, of lawful age, being first duly sworn, on oath, state that I am the owner of real estate in the State of Missouri, over and above pre-emption and homestead rights largely in excess of the amount of the above bond, *i. e.*, $20,000.00.

W. NICHOLS.

Subscribed and sworn to before me this 29th day of November, 1893.

[SEAL.] CHAPMAN S. CHARLOT,
Notary Public.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, E. C. Simmons, of lawful age, and being first duly sworn, on oath state that I am the owner of real estate in the State of Missouri, over and above pre-emption and homestead rights largely in excess of the amount of the above bond, *i. e.*, $20,000.00.

E. C. SIMMONS.

Subscribed and sworn to before me this 29th day of November, 1893. My commission expires Noverber 1st, 1897.

[SEAL.] FRANK WYMAN,
Notary Public.

15 Mr. WILLIAMS: I now offer the decree of the United States circuit court for the central division of the western district of Missouri, rendered March 21, 1895.

Said decree is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

Missouri, Kansas & Texas Railway Company, Complainant,
against
John S. Elliott, Defendant.
} In Equity. (2092.)

The exceptions heretofore filed in this cause by the complainant to the report of the special master in chancery coming on to be heard, and the complainant appearing by its counsel, Messrs. Jackson & Montgomery, and the respondent by his counsel, John Cosgrove, Esq., and William M. Williams, Esq., and after argument of counsel, and the court being fully advised in the premises, doth sustain so much of the exceptions as relate to the findings and conclusions of the special master as to the ties delivered under the contract between complainant and respondent in the months of May and June, 1892; and doth overrule so much of said exceptions as
16 pertain to the ties in controversy delivered under the contract between complainant and respondent for the months of February, March and April, 1892.

It is ordered and decreed, therefore, that the respondent have and recover of the complainant the sum of $31,465.82 on account of the sum owing by complainant to respondent for ties delivered by respondent to complainant under the contract in question during the months of May and June, 1892; and that of this sum, interest is adjudged and decreed to be paid by the complainant at six per centum per annum from the 20th day of June, 1892, on $19,141.60 on account of the ties delivered in the month of May, 1892, and a like interest on the remaining sum of $12,324.22 from the 20th day of July, 1892, on account of the ties delivered in the month of June, 1892, from which sum it is further ordered and decreed that there be deducted the sum of $12,000.00 on account of the sum paid by complainant to respondent by order of this court on the 23d day of November, 1893, with interest added thereto from said 23d day of November, 1893, the balance after such deduction from the sum so found as aforesaid to be paid by complainant to respondent within one hundred days from the date of this decree.

It is further ordered and decreed by the court that the temporary injunction heretofore granted restraining the respondent from the further prosecution of his action at law against the complain-
17 ant respecting the subject-matter of this proceeding in equity, be and the same is hereby made perpetual.

It is further ordered and decreed by the court that the special master herein, Shannon C. Douglas, Esq., be allowed as compensation for his services and expenses incurred in the performance of his duties under the order of this court the sum of $700, and said sum is taxed as costs herein.

It is further ordered and decreed by the court that the costs of this proceeding be divided between and paid by the respective par-

ties in the proportion of two-thirds by the complainant and one-third by respondent, and that execution go accordingly.

March 21, 1895.

JNO. F. PHILIPS, *Judge.*

Mr. WILLIAMS: Now I desire to offer in evidence the order granting the appeal.

Mr. JACKSON: It is admitted that an appeal was duly taken by the plaintiff in this case to the United States court of appeals.

Mr. WILLIAMS: Now then we offer in evidence the mandate and opinion of the United States court of appeals for the eighth circuit, filed in the office of the clerk of the United States circuit court of the central division of the western district of Missouri, on June 23d, 1896.

Stipulation: The opinion is found in the Seventy-fourth Federal Reporter, page 707, and may be referred to and used without copying herein.

18 Mr. WILLIAMS: We offer next the final order of the United States circuit court for the central division of the western district of Missouri, rendered at the October term, 1896—Monday, October 19, 1896.

Said order is in words and figures as follows, to wit:—

THE MISSOURI, KANSAS & TEXAS RAILway Co., Complainant,
vs.
JOHN S. ELLIOTT, Defendant.
} (In Equity.) No. 2092.

Now at this day come again the parties by their respective solicitors, and in accordance with the mandate of the United States circuit court of appeals of the eighth circuit, filed herein, and now presented to the court, it is ordered and adjudged that the injunction heretofore granted in this cause, be and the same is now dissolved, and the order sustaining the exceptions to the report of the special master, is now set aside and vacated, and the complainant's bill is dismissed with costs to be paid by the complainant to the said defendant, and to be taxed by the clerk of this court.

ELMER B. ADAMS, *Judge.*

19 JOHN COSGROVE, being duly sworn in behalf of the plaintiff, testified as follows:—

Direct examination by Mr. WILLIAMS.

Q. Mr. Cosgrove, where do you reside?
A. Boonville, Missouri.
Q. What is your profession or business?
A. Member of the bar, practicing lawyer.
Q. Were you engaged as attorney in the case of the Missouri, Kansas & Texas Railway Company against John S. Elliott, in equity, to restrain the prosecution of a suit instituted by John S Elliott

against the Missouri, Kansas & Texas Railway Company, at law, for the value of certain railroad ties referred to in the record just read?

A. I was.

Q. You may state in a general way, Mr. Cosgrove, what work and labor was done by you as defendant's attorney in dissolving that injunction?

A. There was a special master and commissioner appointed, namely, Mr. S. C. Douglass of Kansas City, to take the testimony. And the testimony was taken in Dallas, Texas, in St. Louis, Boonville, and Sedalia, I think. We went to Sedalia at the time Mr. Douglass came there to hear the argument. We also took depositions at Jefferson City, I think.

Q. Did you attend the taking of testimony at all those places?

A. Yes, sir.

Q. Was the master present to hear the testimony in all those matters?

A. Yes, sir.

20 Q. Do you remember whether Col. Elliott, the defendant, attended?

A. Yes, sir; Mr. Elliott attended in each case; went to Dallas, Texas, was at St. Louis, Jefferson City and Boonville, and all places where testimony was taken. He being the defendant in said suit and acquainted with the details of the evidence, I advised him it was necessary for him to attend in order that I might be able to manage his case, I required his presence to enable me to examine the witnesses.

Q. About how long was that equity case pending before the master?

A. My record shows that he was appointed in October, 1893, and that the master reported in September, '94. That was nearly eleven months.

Q. What, if anything, was done upon the coming in of the master's report?

A. Exceptions were filed by the railway company's attorneys to the master's report. They are quite voluminous.

Mr. WILLIAMS: Well, with a view of showing the character of the work we offer in evidence the exceptions to the report.

Said offer is in words and figures as follows, to wit:—

21 In the Circuit Court of the United States for the Central Division of the Western District of the State of Missouri.

THE MISSOURI, KANSAS & TEXAS RAILway Company, Complainant,
vs.
JOHN S. ELLIOTT, Defendant.
} In Equity. No. 2092.

Exceptions to the Report of Hon. S. C. Douglass, Special Master.

Now comes the above-named complainant and presents its exceptions to the report of the Hon. Shannon C. Douglass, special master

in chancery, and for ground of exceptions shows to the court as follows:

1. That said master erred in concluding and finding, and in reporting that it was not within the contemplation of the parties to the contracts in question and referred to in the pleadings and report in this case, that first-class ties should be those literally and fully complying with the specifications of the contracts.

2. That the said master erred in finding, concluding and reporting that a first-class tie was such a tie as would, in the reason-
22 able intelligent and honest judgment of the inspector, be taken and considered as complying with the specifications. When the parties to this suit had determined what should be a first-class tie by the specifications which they had agreed upon and inserted in the contracts, and because the finding of the master makes first and second class ties the same, to all intents and purposes.

3. The master erred in finding that the only testimony showing how Brewton inspected the ties was the testimony of the parties who reinspected ties for May and June, 1892, thus wholly ignoring the testimony of the defendant, and of his superintendent, Edwards.

The master erred in finding that the respondent did not know when the ties were furnished that they did not conform to the specifications of the contract, and that the respondent relied entirely on the inspections made by the complainant's tie inspector, because the testimony of the respondent and of his superintendent Edwards, shows to the contrary.

5. The master erred in finding that the complainant, through Brewton or any other person, acting on behalf of complainant, furnished any information or made any reports or representations to respondent in regard to the number and classification of ties furnished by respondent.

23 6. The master erred in finding that the respondent did not employ Brewton as his tie inspector, because the respondent himself testified that he had made the arrangements for Brewton to furnish him the information, and it was not agreed or provided in any of the contracts, that the complainant should furnish such information through its tie inspector or any one else, nor was any employee of the complainant authorized to furnish any such information on behalf of complainant or to agree to do so, and the master further erred in regard to this matter, in assuming that there was proof made as to the making of the subcontracts between the respondent and the persons from whom he obtained the ties or any evidence as to the purpose in making said contracts, or that said contracts were subject to complainant's inspection, and the master further erred in this particular in considering, or giving any weight to any such evidence, even if there had been any in the case, because the same was *res inter alios acta*, and this complainant was in no manner concerned with or about the same and was not consulted in regard thereto, and the master erred in admitting or considering any evidence pertaining to said contracts with respondent's said subcontractors. And the master further erred in receiving or con-

sidering any evidence in regard to the prices paid by the respondent to the parties from whom he purchased ties, and he erred in making any finding upon said subject, or in regard to any payments which the respondent had made on account of ties purchased, or as
24 to the time at which any such payments may have been made, with reference to the time at which the ties were inspected as provided for in the contracts between the complainant and respondent, because all such matters were irrelevant and immaterial, and were between the respondent and other persons not parties to this suit, and with which the complainant was in no manner connected.

7. The master erred in assuming that the investigation which complainant caused to be made, and which, for convenience, was spoken of as a "reinspection," was intended to be, or that it should be treated as the inspection provided for in the contracts, and the master farther erred in concluding and finding that the said so-called reinspection was not strictly conducted on the theory that a first-class tie must absolutely and literally conform to all the specifications, whereas as was plain and manifest from the evidence introduced in the case, the said investigation was made for the purpose of ascertaining whether or not, the inspection, as made by Brewton, of the ties furnished in the months of May and June, 1892, was in compliance with the contracts or not, and for the purpose of ascertaining whether or not gross errors and mistakes had been made and certified in the reports which said Brewton had made to complainant, and for the purpose of being able to present the truth in regard to said matters to all persons and in all places whenever it might be necessary to do so.

25 8. The master erred in making and finding or reaching any conclusion to the effect that the respondent had paid his subcontractors and others for the ties purchased by him before he had been notified by the complainant to have the ties, furnished by respondent in the months of May and June, 1892, reinspected, recounted and reclassified, according to the terms of the contracts, for the reason that said matter is wholly immaterial and irrelevant to the investigation of the issues in this case, and because the right of the complainant could not properly be affected by the time or manner of the payment of the respondent's subcontractors.

9. The master erred in finding that it was a fact that the respondent would have been benefited by having a greater number of second-class than first-class ties, and the master further erred in taking said matter into consideration at all, for the reason that it was not involved in the issues of this case, and because the rights of the complainant are not to be affected by the fact that the respondent might realize either a greater or a less profit under any state of facts connected with the business being carried on between the respondent and complainant.

10. The master erred in finding that before any complaint was made by the complainant of the inspection and classification of ties by Brewton, and after the monthly report- of such inspections
26 were made to the respondent by the fuel, tie and lumber agent of the complainant, the respondent settled with him

subcontractors in accordance with the inspections and classifications made by said Brewton, because all said matters were irrelevant and immaterial to the issues of this case, and because there is no evidence to justify the finding that any reports of inspections were made to the respondent by any agent of complainant, or that any agent of complainant had any power or authority to make any such reports to the respondent, or that any agent of the complainant had any authority to give any information or furnish any data to the respondent as a basis upon which he would settle with his subcontractors, or that any person did give or attempted to give any such information as the agent of the complainant.

11. The master erred in finding that in making payments to subcontractors from time to time the respondent was compelled under his contracts with them to pay a greater price for first-class ties than for second-class ties, or that the respondent in making his monthly settlements with his subcontractors paid them on the good faith of Inspector Brewton's inspections and classifications, because there was no evidence to sustain such finding, and because if the same was the fact it is wholly irrelevant and immaterial to the issues of this case, and because the complainant was no party to the said contracts between the respondent and his subcontractors and
27 could not be bound or affected thereby, and because the complainant did not arrange, direct, or control the manner in which the respondent would or did conduct his business transactions with his subcontractors, nor did the complainant agree to furnish any reports of inspections or classifications to the respondent, as a basis for settlement between the respondent and his subcontractors; and because the evidence establishes the fact that the respondent, entirely outside of any contract or agreement with the complainant, made an arrangement by which he himself procured reports from the said inspector Brewton.

12. The master erred in this conclusion of law to the effect that the inspections of the inspector appointed by the complainant were equally conclusive upon both the complainant and respondent.

13. The master erred in his conclusion of law to the effect that it was a matter for the judgment of the inspector to determine what was a first-class tie, when the contract between the parties had particularly specified what should be such.

14. The master erred in his conclusion of law to the effect that where the decision of the inspector was against his employer and no fraud or bad conduct shown, it raised a favorable presumption as to the good faith of such decision.

15. The master erred in concluding that the inspector
28 Brewton, should be regarded as the impersonation of the complainant, and that his acts were those of the complainant especially with reference to the transactions which respondent claims to have had with his subcontractors.

16. The master erred in concluding to the effect that it was the duty of the complainant to see that the inspector, Brewton, performed the services expected of him at a proper time and in proper manner, for the reason that under the circumstances disclosed

in the evidence, the said Brewton was the only person who in behalf of the complainant could know how said duties were being performed, while respondent and his superintendent knew that the said Brewton was not complying with the specifications of the contract.

17. The master erred in concluding that if the said Brewton improperly construed the contract, then his inspection should be set aside, "unless there were other questions of equity or estoppel, which would preclude such things being done," because there were no other questions of equity established in the case, and because there could be no estoppel under the evidence in the case.

18. The master erred in concluding that there was any doubt as to the proper meaning of the contract, or that it was ambiguous in its terms, and the master further erred in this connection in concluding that the construction of the contracts should be con-
29 trolled by the words, acts and conduct of the parties, because the contract was not ambiguous; because the only acts or conduct of the parties disclosed by the evidence in this case was the improper conduct of the inspector, Brewton, which the respondent, and his superintendent, knew, and understood to be in violation of the terms of the contract.

19. The master erred in concluding that "the inspector was obliged to exercise his judgment which he did in deciding which were first-class and which were second-class ties under the specifications and surroundings," because the contracts set forth, without any ambiguity or uncertainty, the specifications for first-class ties, and it was not a matter of judgment, as distinguished from a conclusion of fact as ruled by the master, for the inspector to examine and measure the ties in order to ascertain which of them were first-class ties under the contract.

20. The master erred in concluding that any different rules should be applied to determine the rights of the parties in this suit because the errors were only discovered and the objections were only made after the inspections had been made for the months of May and June instead of for the month of February.

21. The master erred in concluding that the course of business prior to May and June could have any effect upon the rights
30 of the parties in this suit, because the only person who could know the same on behalf of the complainant, was the said inspector, Brewton, who committed the mistakes or wrongful acts; and because during all the time the respondent and his superintendent were cognizant of the fact that Brewton was not making the inspections in accordance with the contract.

22. The master erred in concluding that the complainant was guilty of any negligence or laches in not looking after the inspections made by Brewton, or that the complainant is concluded by the action of Brewton, because it appointed him, especially is this so, because, during all the time, the respondent and his superintendent knew that Brewton was not proceeding in accordance with the contract, and also knew that no one on behalf of the complainant knew of that fact except the said Brewton.

23. The master erred in concluding that the complainant is

estopped to set up the errors and mistakes in the inspections made by Brewton, because there was nothing in the conduct of the complainant upon which the respondent was entitled to rely as the basis for any action by himself, because the complainant did not induce the respondent to do anything to his prejudice, because the respondent all the time knew that the inspector Brewton was not observing the terms of the contract; because the respondent, as a matter
31 entirely outside of the contract, and upon his own account and for his own convenience, arranged with the said Brewton that the latter should furnish to the respondent monthly statements showing the number of first and second class ties which he, Brewton, would report.

24. The master erred in holding the complainant responsible for all the acts of the inspector Brewton, because the powers of said Brewton as the agent of the complainant, were limited by the contract which respondent had executed, and the respondent is not entitled to claim anything against the complainant on account of the acts or conduct of the said Brewton beyond the scope of the powers conferred by said contract.

25. The master erred in making the report which he did because his findings of fact are not supported by any evidence in the case but are contrary to all the evidence in the case, and because in making said findings the master relied upon evidence which was wholly irrelevant and immaterial.

26. The master erred in his said report because the conclusions of law made and reported by him are contrary to law. And because his report as a whole, and his conclusions and recommendations are contrary to the law and evidence applicable to the case.

27. The master erred in his finding as to the amount
32 which he has reported that the respondent is entitled to recover, because, at the outside, the complainant should not be entitled to recover more than $10,506.24.

JACKSON & MONTGOMERY,
Attorneys for Complainant.

Mr. WILLIAMS, resuming examination: Now, I won't ask you to read those. You may state whether those exceptions were argued by counsel.

A. They were argued, and briefs made by both sides before the master — briefs were printed, is my recollection.

Q. Was there more than one lawyer engaged in this matter for Mr. Elliott?

A. Mr. W. M. Williams and myself represented Mr. Elliott. Mr. Williams did not go to Dallas, Texas; I believe didn't go to St. Louis. I think he was at Jefferson City and at Boonville when testimony was taken, and also appeared before the master when he went to Sedalia for the purpose of hearing argument. That was deferred, and afterward went to Kansas City and argued the case.

Q. Who represented the railway company?

A. Mr. Geo. P. B. Jackson was the principal attorney—that is, he was the one that did the active part. Mr. Hagerman, I believe, ap-

peared once or twice. He was at Jefferson City. I think he was at Jefferson City at the time Mr. Purdy was examined.

Q. After that was there any further work to be done?

33 A. Yes, sir; I might say here that in my judgment, the injunction having been granted against the prosecution of the suit at law wherein Elliott was plaintiff, made it necessary for all this work to be done in order to procure the dissolution of the injunction. In other words, the fact that that which would work a dissolution of the injunction necessarily decided the equity case. And there was a great deal of evidence taken, a great deal of work done and investigation of authorities, and an unusual amount of work done in the case. After the master's report came in the United States circuit court for the central division of the western district of Missouri, the exceptions were argued on briefs, Judge Philips sustained the exceptions to the master's report in part, and my recollection is, reduced the amount of plaintiff's claim some five or six thousand dollars, below assessment awarded Elliott by the master's report. Then the usual steps were taken for an appeal, and a writ of error was finally sued out and the case taken to the United States circuit court of appeals for the eighth circuit. The case did not reach there, I think, until some time in September or October, 1895. In 1896 the case was argued by Mr. Williams and myself after having prepared a printed brief.

Q. About how many pages are in that brief? I don't know as that will testify as to the value of it, but at the same time it will show something about the work.

A. The brief was 31 pages of printed matter.

34 Q. How much, Mr. Cosgrove, was involved in the controversy before the master, before his report came in? How much really was the difference between the amount tendered in the bill and the amount claimed in the suit at law?

A. I think there was nine or ten thousand dollars or ten or twelve thousand dollars, which they were ordered to pay over as condition precedent to granting the injunction. In the first place the suit was for $36,000.00, and then they paid $12,000.00. That left twenty-four thousand and some odd dollars in litigation. Now, the exact amount admitted to be due was much more than was left—I think about half of the $24,000 *dollars* that was really in dispute, that is my recollection.

Q. Can you state the personal expense incurred by you as a lawyer in going from place to place to attend the taking of the depositions in this case?

Mr. JACKSON: There is no allegation of anything of that kind, and it is not responsive to any issue in the pleadings, and it is incompetent and irrelevant.

The COURT: Objection sustained.

To which ruling of the court the plaintiff, by counsel, excepted at the time.

Mr. WILLIAMS: Mr. Cosgrove, you may state how long you have been practicing law?

A. Well, sir, I have been practicing law a good long time; I have been practicing law since October, 1863.

Q. Are you familiar with the charges for legal services in central Missouri?

A. I am.

35 Q. I will ask you to state what amount would be a reasonable fee for the services in securing the dissolution of that injunction—legal services?

A. My opinion is $2,000.00 would be a very reasonable fee. It is worth it in my judgment, if worth anything.

Cross-examination by Mr. JACKSON:

Q. Is it a fact that the railway company claimed that there was a mistake in classifying ties?

A. Yes, sir,

Q. Delivered in certain months, May, June and July, I believe it is, of a certain year, and that by reason of that erroneous classification the bills presented by Mr. Elliott were some fifty odd hundred dollars in excess of what the company claimed they should be for those months?

A. Well, I don't recollect, but I know there was several inspections made by Mr. Brewton which they tried to reject, I know we got the amount we claim.

Q. Isn't it a fact that Judge Philips allowed what we claimed on those months, and that the amount——

A. I think Judge Philips did not allow as much as you claimed should be deducted.

Q. We claimed for three months for which we had not paid when this question came up—that there ought to be a reduction between five and six thousand dollars, and a similar mistake having been made several months before, we ought to have had a reduc-

36 tion of about as much more on that?

A. You are right on everything except the amount. The objection was that the ties that were furnished by Mr. Elliott under his contracts and inspected under Brewton was that Brewton had classified as first-class ties those which ought to have been classified as second-class ties, and consequently Elliott's bills were in excess of what they ought to have been under the contracts to the amount of several thousand dollars.

Q. Isn't it a fact that Judge Philips allowed us a reduction for what we claimed on the unpaid bills?

A. I don't remember as to that. The allowance—I think the exceptions were to the ties that had been delivered and used in the railroad bed by the railway company—that those exceptions were overruled, that is my recollection, but sustained exceptions where the bill hadn't been paid and the ties not taken up.

Q. Isn't it a fact that the judgment shows the amount involved in the controversy was about $12,000.00?

A. It was $36,000.00. They paid $12,000.00. The court required before making this injunction order restraining the prosecution of

the suit at law that the railroad company should pay $12,000.00 to Elliott. That left $24,000.00 still due according to Elliott's claim. My recollection is that your tender embraced about half of that amount, but the injunction restrained the prosecution of the suit at law for the whole amount of the $24,000.00.

37 Q. Then upon the entering of the judgment in the court below that left about $6,000.00 in dispute?

A. Six thousand dollars and some hundred, I forget.

Q. From that you appealed?

A. Yes, sir.

Q. About $6,000.00?

A. Yes, sir.

Q. Then you say that this litigation lasted over a period of 11 months?

A. I meant from the filing of the bill until the coming in of the report of the master was about eleven months.

Q. Now, you don't mean that it was constantly receiving attention during all that time?

A. No, sir; I don't mean I was in court every day, or before the master, or taking depositions every day.

Q. In the first place you filed an action at law to recover the amount you received on these ties?

A. Commenced the action in the State court, in the circuit court of Cooper county.

Q. To recover this amount of money?

A. No, there was more than that. I think when the suit was brought it was for forty odd thousand dollars, and then after the suit was instituted the railway company paid $11,000.00.

Q. Well, those were vouchers already on the way and reached you after the institution of the suit?

A. Which left about $36,000.00 claimed by Elliott, and really what he claimed he ought to recover at the time the bill in equity was filed.

Q. Then that action at law was removed to the United States court?

A. Yes, sir; by the railway company.

38 Q. And there the company, the defendant, in order to avail itself of an equitable defense, that is, to have the court set aside the inspection that had been reported; had to bring a separate suit?

A. Well, they did bring a separate suit.

Q. Well, that is necessary under the practice there?

A. Well, if you recollect, I agreed in the United States court to waive that question and allow you to put that in evidence if that could be done. The court held it had to be by separate suit in equity.

Q. And that is the bill in equity filed as number 2092?

A. Yes, sir.

Q. The law case was 2082?

A. Yes, sir; 2092 brought an injunction restraining the prosecution of 2082.

Q. We don't exactly agree about that, but that was a suit brought under the practice of that court?

A. Yes, sir.

Q. And in that case the court made this restraining order?

A. Yes, sir.

Q. Now, in that case, the evidence you have spoken of was taken before the referee, Mr. Shannon Douglass?

A. Yes, sir; master it is called.

Q. Yes, sir; master I should say. That evidence all was in regard to the character of the ties and their dimensions, or rather their dimensions instead of character, that had been reported upon by Mr. Brewton, was it not?

A. Yes, sir.

Q. And there was some testimony taken first in St. Louis, wasn't there?

A. Yes, sir.

39 Q. That was the first place you took testimony?

A. Yes, sir.

Q. And that was taken in one day?

A. I don't recollect, Mr. Jackson, how that was. (Witness referring to a book.) That was taken at eight a. m. on the 5th, and then stipulated that we were to next take evidence at Dallas. I went down to St. Louis on the 5th and returned on the 7th. Left here the night of the 5th, spent the sixth there and came home the next day.

Q. Spent one day?

A. Yes, sir; $18.95 was my individual expenses.

Q. $18.95 for one day in St. Louis? Now, let that go in the record, I want to get that in the record, $18.95 for one day in St. Louis.

The COURT: You say also two nights?

A. It cost me $14 on the railroad. I had to give $14 of that to the railroad.

Mr. JACKSON: Now, then, we agreed to take evidence at Dallas?

A. Yes, sir.

Q. It was some time before we went to Dallas?

A. No, sir; left on the 15th. That was in January.

Q. Of what year?

A. '94.

Q. How long were we in Dallas?

A. Four days, or five—that is, from the time I left until I returned.

Q. So we spent two days down there taking evidence, did we?

A. Yes, sir; that is my recollection.

40 Q. Then we came back and took some testimony at your office in Boonville, didn't we?

A. Yes, sir.

Q. Took Mr. Elliott's testimony and Mr. Sturgeon's and Mr. Purdy's?

A. Yes, sir; that was on the 22d of January.

Q. That was all the evidence in that case, wasn't it?

A. Yes, sir—"Completed taking testimony today at Boonville, January 22d, 1894."

Q. That was one day. Then at some subsequent time the matter was taken up before the referee?

A. On the 19th of March went to Sedalia to argue the case before the special master, which was not done.

Q. Then it was submitted on briefs?

A. My recollection is that we went to Kansas City and argued it, didn't we?

Q. No. Don't you know that is the time you sent me up there?

A. Yes, sir; I recollect that is the time you went up and came back and came very nearly getting hurt.

Q. I don't claim any offset on account of the treatment I received in the case. We then submitted it on briefs?

A. Yes, sir.

Q. Then afterwards the master filed his report in the case?

A. I received notice of that on the 15th day of September, 1894, and he found $24,759.60 and interest on the same at six per cent. on the debts as they respectively became due.

Q. Then the complainant filed exceptions?

A. Yes, sir; in October.

41 Q. And they were submitted to the court on briefs?

A. Well, I see on the — of ——, '95, I received a copy of your brief on exceptions.

Q. They were not argued before Judge Philips?

A. Printed brief and mailed to Judge Philips. Then went to Jefferson City on March 21.

Q. For what purpose, in this case?

A. Yes, sir.

Q. What did you do then?

A. I spent $12.75, I notice that. "Went to Jefferson City on the 18th and returned this a. m." That was the 21st. There was something in the case.

Q. You went down on another case?

A. No, sir; went down on that case. That is when the judge disposed of the exceptions.

Q. Well, there was nothing for you to do except to hear what the court said?

A. Yes, sir.

Q. That is one day's attention and attendance?

A. Yes, sir. He entered up judgment. He reduced the respondent's claim from $24,579.60 and interest to $19,465.82, something over five thousand dollars—well, it is very near six.

Q. These services that we have been talking about, that you have estimated the value of——

A. Yes, sir; I estimate the services, Mr. Jackson, in that case from the time that it started in the United States circuit court until it ended in the same court at Jefferson City, including services, printing briefs and attorneys' expenses in both the circuit court and the United States court of appeals, and before the master—the whole

labor done in the case. For both myself and Mr. Williams I think $2,000 a very moderate fee.

42 Q. Well, I am not complaining about that. I think you ought to have had more for the work you did, but then we ought not to pay it.

Q. There was no special argument upon any feature of the case as involving the restraining order or injunction, was there?

A. No, no; he granted it as a matter of course.

Q. Then there was nothing more said about that until the case was decided on the merits?

A. Yes, I won't say whether both the briefs, but I'll state the brief in the United States court of appeals asked for a dissolution of the injunction. We objected to the granting of the injunction. In the other case it was granted and wouldn't make you pay anything. In this case we had some authorities. Judge Philips says: "Where did you get any authority for that?" and we happened to have some.

Q. I don't care about the crusher case, you are not claiming for that?

A. No, sir.

Q. The only time that there was any discussion on the subject of injunction in this whole proceeding was before the order was made, you and Mr. Williams contended, when we applied for the injunction, that we should be required to pay the amount we admitted was due?

A. Yes, sir.

Q. And at that time Judge Philips made a provisional order that we must pay $12,000.00?

A. Yes, sir; about half what was admitted.

Q. He gave us a certain length of time to pay that?

A. Yes, sir.

Q. And upon the paying of that he made the order?

43 A. Yes, sir; one of the conditions of the order was that you were to pay the $12,000.00 in a certain time.

Mr. JACKSON: Well, we will consider the order in evidence.

Mr. WILLIAMS: The order is in evidence.

Said order is in words and figures as follows, to wit:—

In the Circuit Court of the United States in and for the Central Division of the Western District of Missouri, October Term, 1893, Wednesday, October 25, 1893.

Present: Hon. John F. Philips, judge.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
against
JOHN S. ELLIOTT, Respondent.

Now on this day comes the parties hereto by their respective counsel, and the court being fully advised in the premises, it is by the court ordered that respondent herein be enjoined and restrained

from prosecuting his action at law against the complainant herein, the same being case No. 2082 on the law docket of this court, upon conditions that the complainant herein, The Missouri, Kansas
44 & Texas Railway Company, pay the respondent herein, John S. Elliott, on or before the 1st of December, 1893, the sum of twelve thousand dollars ($12,000.00) and on or before the 1st of December, 1893, enter into a bond payable to the said John S. Elliott, in the penal sum of twenty thousand ($20,000.00) dollars to indemnify the respondent, John S. Elliott, as in the form of bonds for injunction in equity practice, the security to be approved by the clerk of this court; and thereupon the respondent, by his counsel, files his answer to the complainant's bill; and it is ordered by the court that Shannon C. Douglass be and he is hereby appointed and selected the special master in chancery and the special examiner to take testimony herein. It is further ordered that the special master and examiner complete the taking of testimony on the part of the complainant, on or before the 1st day of January, 1894, and that he complete the taking of testimony on behalf of the respondent on or before the 1st day of February, 1894, and the testimony in rebuttal, if desired thereto, on or before the 16th day of February, 1894. It is further ordered that the matter in controversy be referred to the special master to make his findings upon the questions of fact and his conclusions of law thereon respecting the allegations of the bill and the special defenses thereto, if any be set up by the respondent in his answer and make his findings of fact upon all the issues arising in the case, and that he also report his conclusions
45 thereon to this court with all reasonable diligence; and this cause is continued for further orders and proceedings.

JOHN F. PHILIPS, *Judge.*

Mr. JACKSON, resuming: Aren't you mistaken in saying in the court of appeals there was anything said about the injunction?

A. I think not. I may be mistaken. I know it was said orally by myself, if not by Mr. Williams. If you will let me see that brief I will show you.

Q. I think if you look at it you will find you didn't discuss the question of the injunction at all.

Mr. WILLIAMS: The result of the whole proceedings was we had to do all this to get the injunction dissolved.

Mr. COCKROVE: I know we argued it, and I was almost sure it was in one of the briefs, and I think so still.

Mr. JACKSON: It went as a matter of course if you defeated us in the case the injunction was dissolved?

WITNESS: Yes, sir.

(Witness excused.)

JOHN S. ELLIOTT, being duly sworn in his own behalf, testified as follows:—

Direct examination by Mr. WILLIAMS:

Q. You were the defendant in the case of The Missouri,
46 Kansas & Texas Railway Company against John S. Elliott to restrain the proceeding to collect the amount alleged to be due for the ties which have been spoken of here, were you?

A. Yes, sir.

Q. I will get you to state whether you attended before the master at the various times and places on taking the depositions and testimony of the witnesses.

A. Everywhere.

Q. And if you attended at the court—looked after your interest.

A. Yes, sir.

Q. Now, you may state if you can, Colonel, in a general way, the amount of your personal expenses in and about the particular case that we are talking about here now.

A. Well, I didn't keep a very close record of it, but I must have spent two or three hundred dollars.

(Witness excused.)

Plaintiff rests.

Thereupon the defendant to sustain the issues upon its part, offered evidence as follows, to wit:—

H. C. GEISBERG, being duly sworn in behalf of the defendant, testified as follows:—

Direct examination by Mr. JACKSON:

Q. You are the clerk of the United States circuit court at Jefferson City?

A. Yes, sir.

Q. And there was pending in that court the bill in equity No. 2092, and there was filed a law action No. 2082, referred to by Mr. Cosgrove, whose testimony you have heard?

A. Yes, sir.

47 Mr. JACKSON: Now, I suppose it will be conceded that that is the action covering the ties that were enjoined in this case?

Mr. WILLIAMS: Yes, sir.

Mr. JACKSON: Defendant offers in evidence the petition in the tie case, No. 2082, Elliott against the Missouri, Kansas and Texas Railway Company.

Said offer is in words and figures as follows, to wit:

In the Circuit Court of the United States within and for the Central Division of the Western District of the State of Missouri.

JOHN S. ELLIOTT, Plaintiff,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Now at this day comes the above-named plaintiff by his attorneys, and, by leave of the court first had and obtained, files this, his amended petition, and states that the defendant now is and was during the year 1892, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and as such corporation was and is the owner and engaged in operating
48 the Missouri, Kansas & Texas railway, and the branches thereof, in the States of Missouri, Kansas and Texas and the Indian Territory.

And for his cause of action herein plaintiff further states that during the months of February, March, April, May, June, July and August, 1892, he sold and delivered to the defendant, at its special instance and request railroad cross and switch ties to the amount and value of $134,500.21; that defendant paid therefor the sum of $97,740.11, of which said sum $11,768.90 has been paid since the commencement of this suit, to wit: on the 24th day of September, 1892, leaving a balance due and owing to the plaintiff for and on account of said railroad cross and switch ties so sold and delivered to and received by the defendant, the sum of $36,759.73, all of which will more fully appear by reference to the itemized account and statement thereof, hereto attached and marked "Exhibit A."

Wherefore the plaintiff says that the defendant is indebted to him for and on account of the sale and delivery of said railroad cross and switch ties, as aforesaid, in the said sum of $36,759.73, which became and was due and payable to the plaintiff on the 15th day of September, 1892, and for which said sum and interest thereon from the said 15th day of September, 1892, at the rate of six per cent. per annum, and his costs herein laid out and expended. Plaintiff asks judgment.

JOHN COSGROVE,
Attorney for Plaintiff.

49 It was agreed between the parties that all record entries, and all papers in the case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, No. 2082, and Missouri, Kansas & Texas Railway Company *v.* John S. Elliott, in equity, No. 2092, in the United States circuit court for the central division of the western district of Missouri, are considered in evidence, and either party may read or print such part thereof as is desired.

Mr. JACKSON: You introduced the final judgment in this case?

Mr. WILLIAMS: Yes, sir. I first introduced the petition for the injunction, then the order of Judge Philips making it provisional, then the bond, then the decree.

Mr. JACKSON: Does the entry that you read here, that final entry, show the term at which it was entered?

A. Yes, sir.

Q. Now, at what term was that entered?

A. The October term, '96, the 19th of October.

Mr. JACKSON: We offer in evidence a statement furnished by Mr. Geisberg showing the commencement and adjournment of the several terms during the years 1893, '4, '5 and '6. This is taken directly from your records by yourself?

A. Yes, sir.

Said offer is marked Exhibit "A," and is in words and figures as follows, to wit:

50 United States Circuit Court. Central Division of the Western District of Missouri.

Statement of the Terms of Court for the Years 1893, 1894, 1895, 1896.

March term, 1893.—Court opened and was held March 20, 21, 22, 23, 24, April 17, when it was by written order adjourned to May 29 on which day it was adjourned to court in course.

October term, 1893.—Court opened October 16, on which day it was by the marshal adjourned to Oct. 23, and was in session Oct. 23, 24, 25, 26, 27, 28.

March term, 1894.—Court opened March 19 and was by written order adjourned to March 26, and was in session March 26, 27 and 28.

October term, 1894.—Court was opened and in session Oct. 15, 16, 17, 18, Nov. 19.

March term, 1895.—Court opened and was in session March 18, 19, 20, 21.

October term, 1895.—Court opened and was in session October 21, 22, 23 and 24.

March term, 1896.—Court opened March 16, and was on that day by written order adjourned to March 23, and was in session March 23, 24, 25, 26, 27, 28.

October term, 1896.—Court was opened and in session, Oct. 19, 20 and 21.

WESTERN DISTRICT OF MISSOURI, *set:*

51 I, Henry C. Geisberg, clerk of said court, do hereby certify that the foregoing is a true statement of the days on which the court was in session and open for business.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of Jefferson, Mo., this 27th day of October, A. D. 1897.

[SEAL OF COURT.] H. C. GEISBERG, *Clerk.*

Mr. JACKSON: Have you the record entries in case No. 2082?

A. Yes, sir.

Mr. JACKSON: I'll offer these two certified transcripts; 2082 is a copy of every record entry in that case?

A. Yes, sir.

Q. And the certified copy No. 2092 is a certified copy of every record entry in that case?
A. Yes, sir.

Said certified transcript offered of case No. 2082 is marked Exhibit "B," and is in words and figures as follows, to wit:

In Vacation, Monday, November 14, 1892.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY CO. } 2082.

This day there is received by mail and filed, a transcript
52 of the record and proceedings in this cause, as certified from the circuit court of Cooper county, Missouri; also the deposition of I. A. Taylor on behalf of the plaintiff.

March Term, 1893—Tuesday, March 21st, 1893.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY. } 2082.

This day comes the plaintiff by his attorneys and by leave of court files an additional transcript from the circuit court of Cooper county, Missouri.

March Term, 1893—Thursday, March 23rd, 1893.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY. } 2082.

This day come the parties by their respective attorneys, the plaintiff by Messrs. Cosgrove and Johnston and the defendant by Messrs. James Hagerman and George P. B. Jackson, whereupon plaintiff by leave of court, files an amended petition, to which order of the court granting leave to file such amended petition, the defendant
53 excepted and tenders its bill of exceptions which is signed and sealed by the judge, and ordered to be filed, and made part of the record in this case. Plaintiff also files a stipulation of counsel that a copy of said amended petition be this day sent to the attorneys for the defendant, and the defendant plead to said amended petition on or before the first day of May next.

In Vacation, Saturday, May 20th, 1893.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY. } 2082.

This day there is received by mail, and filed herein, defendant's answer to the amended petition.

March Term, 1895—Thursday, March 21st, 1895.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS & TEXAS R'Y CO. } 2082.

It appearing to the court that the further prosecution of this cause has been perpetually enjoined by the decree this day
54 rendered in the cause between the same parties No. 2092 on the equity docket of this court, it is therefore ordered that this cause be stricken from the docket.

October Term, 1895—Tuesday, October 22d, 1895.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS & TEXAS R'Y CO. } 2082.

This day come the parties by their attorneys, whereupon plaintiff files motion to retax the costs in this cause, which motion was argued and submitted. (This entry is made *nunc pro tunc* as of yesterday, Oct. 21st, 1896.)

October Term, 1896—Tuesday, October 20th, 1896.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS & TEXAS R'Y CO. } 2082.

This day it is ordered that the order entered March 21st,
55 1895, striking this case from the docket, and the clerk's taxation of costs made in pursuance thereof, be set aside.

JOHN S. ELLIOTT
vs.
MISSOURI, KANSAS & TEXAS R'Y CO. } 2082.

This day comes the plaintiff by his attorneys, Messrs. John Cosgrove and W. M. Williams, and the defendant by Geo. P. B. Jackson, Esq., its attorney, and this case being called for trial, a stipulation is filed waiving a jury herein; thereupon the case is tried by the court sitting as a jury, and submitted upon the pleadings, stipulation and proofs; on consideration whereof the court finds the issues joined for the plaintiff, and that the defendant is indebted to the plaintiff in the sum of thirty-two thousand, three hundred and fifty-five dollars and forty-seven cents ($32,355.47). It is therefore considered by the court that the plaintiff, John S. Elliott, recover of and from the defendant, The Missouri, Kansas & Texas R'y Co., the sum of thirty-two thousand three hundred and fifty-five dollars and forty-seven cents ($32,355.47) the amount so as aforesaid by the court found to be due together with his costs herein laid out and expended and that he have execution thereof.

56 UNITED STATES OF AMERICA, } *sct:*
Western District of Missouri, }

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the central division of the western district of Missouri, do hereby certify that the foregoing writing is a full, true and complete copy of the court orders and all the record entries in the cause therein mentioned, as fully as the same remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 28th day of October, A. D. 1897.

[SEAL OF COURT.] H. C. GEISBERG, *Clerk.*

Said certified transcript offered of case No. 2092, is marked Exhibit "C," and is in words and figures as follows, to wit:—

October Term, 1893—Wednesday, October 25th, 1893.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY } 2092.
vs.
JOHN S. ELLIOTT. }

This day the following order was filed in the above-entitled cause, to wit:

57 In the Circuit Court of the United States in and for the Central Division of the Western District of Missouri, October Term, 1893, Wednesday, October 25th, 1893.

Present: Hon. John F. Philips, judge.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, } 2092.
Complainant,
against
JOHN S. ELLIOTT, Respondent. }

Now on this day come the parties hereto by their respective counsel, and the court being fully advised in the premises, it is by the court ordered that respondent herein be enjoined and restrained from prosecuting his action at law against the complainant herein, the same being case No. 2082 on the law docket of this court, upon conditions that the complainant herein, The Missouri Kansas & Texas Railway Co., pay the respondent herein, John S. Elliott, on or before the 1st day of December, 1893, the sum of twelve thousand dollars ($12,000), and on or before the 1st day of December, 1893, enter into a bond payable to the said John S. Elliott, in the penal sum
58 of twenty thousand ($20,000.00) dollars to indemnify the respondent, John S. Elliott, as in the form of bonds for injunction in equity practice, the security to be approved by the clerk of this court; and thereupon, the respondent, by his counsel, files his answer to the complainant's bill; and it is ordered by the court that Shannon C. Douglass be, and is hereby appointed and selected the

special master in chancery and the special examiner to take testimony herein. It is further ordered that the special master and examiner complete the taking of testimony on the part of the complainant, on or before the 1st day of January, 1894, and that he complete the taking of testimony on behalf of the respondent on or before the 1st day of February, 1894, and the testimony in rebuttal, if desired thereto, on or before the 16th day of February, 1894. It is further ordered that the matter in controversy be referred to the special master to make his finding upon the questions of fact and his conclusions of law thereon respecting the allegations of the bill and the special defenses thereto, if any be set up by the respondent in his answer and make his finding of fact upon all the issues arising in the case, and that he also report his conclusions thereon to this court with all reasonable diligence; and this cause is continued for further orders and proceedings.

JNO. F. PHILIPS, *Judge.*

59 October Term, 1893—Friday, October 27th, 1893.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

Ordered that the order herein for injunction and appointment of special master and examiner, dated 25th, be so modified and amended that the taking of testimony by the complainant in rebuttal, shall be completed on February 16th, 1894, which amendment is made by erasure and interlineation upon the original order filed herein before same had been recorded.

In Vacation, Saturday, November 4th, 1893.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

This day comes the complainant, by its solicitor, and files its replication to the answer herein.

60 In Vacation, Friday, November 10th, 1893.

MISSOURI, KANSAS AND TEXAS RAILWAY CO.
vs.
JOHN S. ELLIOTT. } 2092.

This day there is filed a stipulation of counsel, that the complainant may, with the leave of court or of the judge, correct the said bill by inserting at the end of the first paragraph on said page four of the bill of complaint the following words which appear in the original contract, and which were inadvertently omitted from the copy thereof in the bill, to wit: "and nineteen (19) cents apiece for all second-class ties delivered in the Indian Territory." And upon the making of such addition in the bill or upon the filing of

this stipulation all objection on account of said omission shall be considered as waived, and the said bill of complaint shall thereafter be considered and treated as though the said words had been originally inserted and printed therein.

In Vacation, Friday, December 1st, 1893.

MISSOURI, KANSAS & TEXAS RAILWAY CO. *vs.* JOHN S. ELLIOTT. } 2092.

61 This day there is filed an injunction bond as required by the order herein, dated October 25th, 1893; the sureties in the said bond having been approved by the clerk of this court, as required by the said order.

In Vacation, Monday, September 17th, 1894.

MISSOURI, KANSAS & TEXAS RAILWAY CO. *vs.* JOHN S. ELLIOTT. } 2092.

This day comes S. C. Douglass, Esq., the master, heretofore, appointed in this cause, and files his report of his findings herein.

October Term, 1894—Monday, October 15th, 1894.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *vs.* JOHN S. ELLIOTT. } 2092.

This day comes the complainant by its solicitors and files its exceptions to the master's report herein.

62 In Vacation, Saturday, January 26th, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *vs.* JOHN S. ELLIOTT. } 2092.

This day comes the complainant by its solicitors and files its exceptions to the master's report in this cause, also a brief in support of the same.

March Term, 1895—Thursday, March 21st, 1895.

This day the following decree was filed, to wit:—

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant, *against* JOHN S. ELLIOTT, Respondent. } (In Equity.) 2092.

Decree.

63 The exceptions heretofore filed in this cause by the complainant to the report of the special master in chancery, coming on to be heard, and the complainant appearing by its counsel, Messrs. Jackson & Montgomery, and the respondent by his counsel, John Cosgrove, Esq., and William M. Williams, Esq., and after argument of counsel, and the court being fully advised in the premises doth sustain so much of the said exceptions as relate to the findings and conclusions of the special master as to the ties delivered under the contract between complainant and respondent in the months of May and June, 1892; and doth overrule so much of the said exceptions as pertain to the ties in controversy delivered under the contract between complainant and respondent for the months of February, March and April, 1892.

It is ordered and decreed, therefore, that the respondent have and recover of the complainant the sum of $31,465.82 on account of the sum owing by complainant to respondent for ties delivered by respondent to complainant under the contract in question during the months of May and June, 1892, and that of this sum, interest is adjudged and decreed to be paid by the complainant at six per centum per annum from the 20th day of June, 1892, on $19,141.60 on account of the ties delivered in the month of May, 1892; and a like interest on the remaining sum of $12,324.22 from the 20th day of July, 1892, on account of the ties delivered in the month of June, 1892; from which sum it is further ordered and decreed that

64 there be deducted the sum of $12,000.00 on account of the sum paid by complainant to respondent by order of this court, on the 23rd day of November, 1893; with interest added thereto from said 23rd day of November, 1893; the balance after such deduction from the sum so found as aforesaid to be paid by complainant to respondent within one hundred days from the date of this decree.

It is further ordered and decreed by the court that the temporary injunction heretofore granted restraining the respondent from the further prosecution of his action at law against the complainant respecting the subject-matter of this proceeding in equity, be and the same is hereby made perpetual.

It is further ordered and decreed by the court that the special master herein, Shannon C. Douglass, Esq., be allowed as compensation for his services and expenses incurred in the performance of

his duties under the order of this court, the sum of $700 and said sum is taxed as costs herein.

It is further ordered and decreed by the court that the costs of this proceeding be divided between and paid by the respective parties in the proportion of two-thirds by the complainant and one-third by the respondent, and that execution go accordingly.

JNO. F. PHILIPS, *Judge.*

March 21st, 1895.

65 In Vacation, Monday, August 19th, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

This day comes the defendant by his solicitors and files an assignment of errors herein.

In Vacation, Saturday, August 24th, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

This day comes the defendant by his solicitor and files a petition for an appeal with order indorsed thereon, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

MISSOURI, KANSAS & TEXAS RAILWAY CO., Complainant,
vs.
JOHN S. ELLIOTT, Respondent. } No. 2092.

66 The above-named respondent, John S. Elliott, conceiving himself aggrieved by the final decree entered in said court in the above-entitled action on the 21st day of March, 1895, doth hereby appeal from said judgment, order and decree, to the United States circuit court of appeals of the eighth judicial circuit, and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made duly authenticated, may be duly sent to the United States circuit court of appeals for the eighth circuit.

JOHN COSGROVE,
W. M. WILLIAMS,
Solicitors for Defendant, John S. Elliott.

And now, to wit, on the 22d day of August, 1895, it is hereby ordered that the appeal be allowed as prayed above.

JNO. F. PHILIPS, *Judge.*

In Vacation, Monday, September 29th, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

This day there is filed defendant's appeal bond with the approval of Hon. John F. Philips, judge, endorsed thereon.

67 In Vacation, Monday, September 23d, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

This day comes the special master, appointed herein, and files his supplemental report as to costs in this cause.

In Vacation, Thursday, September 26th, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

This day there is filed a stipulation of counsel agreeing that certain evidence be omitted in making out the transcript in this cause for the court of appeals.

In Vacation, Tuesday, June 23d, 1896.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN S. ELLIOTT. } 2092.

68 This day there was received by mail and filed the mandate of the United States circuit court of appeals, eighth circuit, in this cause.

October Term, 1896—Monday, October 19th, 1896.

This day the following decree was filed, to wit:—

THE MISSOURI, KANSAS & TEXAS RAILWAY Co., Complainant,
vs.
JOHN S. ELLIOTT, Defendant. } In (Equity). 2092.

Now at this day come again the parties by their respective solicitors, and in accordance with the mandate of the United States circuit court of appeals of the eighth circuit, filed herein, and now presented to the court, it is ordered and adjudged that the injunction heretofore granted in this cause, be, and the same is now dissolved, and the order sustaining the exceptions to the report of the special master, is now set aside and vacated, and the complainant's bill is

dismissed with costs to be paid by the complainant to the said defendant, and to be taxed by the clerk of this court.

ELMER B. ADAMS, *Judge.*

Know all men by these presents; that the undersigned,
69 The Missouri, Kansas and Texas Railway Company, a corporation, as principal, and E. C. Simmons, of St. Louis, Mo., and Wm. Nichols, of St. Louis, Mo., as sureties are held and firmly bound unto John S. Elliott in the sum of twenty thousand dollars, to the payment whereof we hereby bind ourselves, our successors, heirs and administrators, firmly by these presents.

Signed and sealed this twenty-ninth day of November, 1893.

The condition of the above bond is as follows, to wit:

Whereas, the above-bounden principal, The Missouri, Kansas and Texas Railway Company in a suit in equity instituted by it against the said John S. Elliott in the circuit court of the United States for the central division of the western district of Missouri, and which suit is numbered 2092 in said court, has applied for and obtained a temporary injunction, the nature and purpose of which said temporary injunction is to restrain the prosecution of an action at law, in which the said John S. Elliott is plaintiff and the said Missouri, Kansas and Texas Railway Company is defendant now pending in the above-named court and under the number 2082.

Now, if the said Missouri, Kansas and Texas Railway Company, will abide the decision which may be made in said case, number 2092, and upon said injunction and shall pay all sums of money, damages and costs that shall be adjudged against it if the
70 said temporary injunction shall be dissolved, then this obligation shall be void, otherwise to remain in full force and effect.

THE MISSOURI, KANSAS & TEXAS RAILWAY CO.,
By THOS. C. PURDY,
Vice-President & General Manager.
W. NICHOLS. [SEAL.]
E. C. SIMMONS. [SEAL.]

The sureties in this bond approved this first day of December, A. D. 1893.

H. C. GEISBERG, *Clerk.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, W. Nichols, of lawful age, first being duly sworn, on oath state that I am the owner of real estate in the State of Missouri over and above pre-emptions and homestead rights largely in excess of the amount of the above bond, *i. e.* $20,000.00.

W. NICHOLS.

Subscribed and sworn to before me this 29th day of November, 1893.

[SEAL.] CHAPMAN S. CHARLOT,
Notary Public.

71 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, E. C. Simmons, of lawful age, first being duly sworn, on oath state that I am the owner of real estate in the State of Missouri over and above pre-emption and homestead rights largely in excess of the amount of the above bond, *i. e.*, $20,000.00.

E. C. SIMMONS.

Subscribed and sworn to before me this 29th day of Nov., 1893.
My commission expires Nov. 1st, 1897.

[SEAL.] FRANK WYMAN,
Notary Public.

UNITED STATES OF AMERICA, }
Western District of Missouri. }

I, Henry G. Geisberg, clerk of the circuit court of the United States in and for the central division of the western district of Missouri, do hereby certify that the foregoing writing is a full, true and complete copy of all the court orders, record entries and the injunction bond in the cause therein mentioned, as fully as the same remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 28th day of October, A. D. 1897.

[SEAL OF COURT.] H. G. GEISBERG, *Clerk.*

72 Mr. WILLIAMS: Such rules of the United States court as Mr. Jackson proposes to put in the record may be considered in.

JOHN COSGROVE, being recalled for further cross-examination by the defendant, testified as follows:

Recross-examination by Mr. JACKSON:

Q. You collected and received from the clerk part of the fees taxed in this case as attorneys' fees?

A. Yes, sir; whatever was allowed by the rules of the court was paid over.

Q. It was in the neighborhood of one hundred dollars?

A. Yes, sir.

Q. So much for each deposition?

A. No, there was some in the other case. I think the whole thing was $60. I will find it and give it to the stenographer some time. (Said statement afterwards given as follows: I received $57.50 in the equity case and $10 in the law case.)

And this was all the testimony offered.

Whereupon the plaintiff prayed the court to declare the law as follows, to wit:

The court declares the law to be that the execution of the bond sued on, and the dissolution of the injunction referred to therein, are admitted by the parties, and plaintiff is entitled to recover his

reasonable personal expenses and reasonable attorneys' fees
73 incurred for services of attorneys in procuring the dissolution of said injunction, if the court find that any such expenses were so incurred, not exceeding two thousand dollars.

To which the defendant objected, which objection the court overruled and gave the said instruction notwithstanding; to which action of the court the defendant then and there excepted at the time.

The defendant upon its part prayed the court to declare the law as follows, to wit:

1. The court declares the law to be that, under the pleadings and evidence, the plaintiff is not entitled to recover, and the finding must be for the defendant.

2. The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on any sum which he may have paid out or become liable for as attorneys' fees.

3. The court declares the law to be that unless the plaintiff has established by the evidence in the case that damages were awarded to him and adjudged in his favor by the court which dissolved the injunction, there can be no recovery upon the bond sued on in this case.

4. The court declares the law to be that the plaintiff is not
74 entitled to recover as damages upon the bond sued on in this case any amounts expended by him for his personal expenses incurred in traveling from place to place to attend the taking of testimony concerning the inspection of the ties for which he had brought his suit against the defendant.

5. The court declares the law to be that the plaintiff, having received the amount taxed in his favor as attorneys' fees as part of the costs in the equity suit mentioned in the pleadings and evidence in this case, he cannot now recover anything on account of attorneys' fees in this case.

6. The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on in this case any amounts which he may have paid out or become liable for as attorneys' fees for services rendered by his attorneys in the equity suit in the United States court mentioned in the pleadings and evidence in connection with the issue in regard to the correctness of the inspection of the ties mentioned therein, nor for the purpose of sustaining the inspection originally made, and upon which the plaintiff had brought his action at law, which was referred to in said equity suit.

7. The court declares the law to be that the granting of the injunction, on account of which the bond sued on was given, was a
75 mere incident to the equity case mentioned in the pleadings and evidence, the main purpose of which was to vacate and set aside an inspection of certain ties, for which the plaintiff had brought a suit at law, and that the bringing of said suit in equity, and the obtaining of the temporary injunction therein, was necessary under the practice of the United States court to enable

this defendant to make its defense against the claim set up by this plaintiff in the action at law commenced in the Cooper circuit court and removed to the United States circuit court, and the plaintiff is not entitled under any circumstances to recover as damages on the injunction bond sued on any attorneys' fees except such as were necessary and reasonable to be paid for the particular purpose of securing a dissolution of said temporary injunction as distinguished from the fees for services in relation to the merits of the main purpose of said equity suit.

Which said declarations of law numbered 1, 2, 3, 4, 5, 6 and 7 the court refused to give in behalf of the defendant, to which refusal of the declarations thus prayed the defendant, by counsel, excepted at the time.

Thereupon the court returned its finding in favor of the plaintiff.

And thereupon within four days after the date of said finding and judgment, to wit, on the 2d day of December, 1897, the
76 defendant filed its motion for a new trial in words and figures as follows, to wit:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

JOHN S. ELLIOTT, Plaintiff,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Now comes the above-named defendant and moves the court to set aside the finding and judgment in this case, and to grant a new trial herein for the following reasons, to wit:

I.

Because the court erred in giving illegal and improper instructions prayed by the plaintiff over and against the objections of defendant.

II.

Because the court erred in refusing to give legal and proper instructions prayed by the defendant.

77 III.

Because the finding and judgment are contrary to the evidence, and are against the law, and are against both the law and the evidence.

IV.

Because upon the whole case the judgment is for the wrong party, being for the plaintiff when it should be for the defendant.

GEO. P. B. JACKSON,
Attorney for Defendant.

Which said motion the court on the 6th day of December, A. D. 1897, overruled, to which ruling and order of the court the defendant, by counsel, excepted at the time.

And thereupon leave was given to the defendant to file its bill of exceptions in this case on or before the first day of February, 1898, and the defendant now tenders this, its bill of exceptions in this case, and prays that the same may be signed, sealed, filed, and made a part of the record herein, which is accordingly done on the 27th day of January, 1898.

D. W. SHACKLEFORD, [SEAL.]
Judge of the Cooper Circuit Court.

78 In due time the plaintiff filed its affidavit and bond for appeal and has duly brought the case to this court.

GEO. P. B. JACKSON,
For Appellant.

79 And thereafter, in due time, the said appellant, Missouri, Kansas & Texas Railway Company, filed its brief containing a statement of the points and authorities in words and figures as follows, to wit:

80 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. 5065.

Appeal from Cooper circuit court.

Appellant's Statement and Brief.

Geo. P. B. Jackson, for appellant, Wainwright bldg., St. Louis.

81 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. 5065.

Appeal from Cooper circuit court.

Statement.

This is an action commenced in the Cooper circuit court, to the October term, 1897, on an injunction bond, given in a suit in the United States court for the western district of Missouri. The bond was in the sum of $20,000, and conditioned as follows: "Now, if the said Missouri, Kansas and Texas Railway Company will
82 abide the decision which may be made in said case, No. 2092, and upon said injunction and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation shall be void, otherwise to remain in full force and effect."

The petition alleged that the bond was given in a suit brought to restrain the prosecution of another suit previously commenced by this plaintiff against this defendant, and that the temporary injunction was dissolved, and that in procuring the dissolution he was put to great expense, in the sum of $200 for his personal expenses and $1,800 for attorneys' fees. The prayer was for judgment for $20,000, and that execution issue for $2,000 and costs.

The answer admitted the making of the bond, but denied that the suit in which it was given was instituted by this defendant to obtain an injunction against plaintiff, but that the injunction was merely an incident to a suit instituted for the main and principal purpose of cancelling and annulling a certain report of inspection of ties, which was necessary to enable this defendant to make its defense in said United States court to the action of plaintiff against defendant mentioned in the petition.

The other allegations of the petition were denied. There was a trial without a jury, and judgment for plaintiff for $2,000 and defendant failing to secure a new trial, has appealed.

The evidence developed on the trial showed the following facts:

The plaintiff Elliott sued defendant in the circuit court of
83 Cooper county, to recover a large sum for ties furnished defendant. The case was removed to the United States court. Defendant claimed that the inspection of the ties sued for, and for a large number of ties which had been previously paid for was the result of fraud and mistake and that instead of being nearly all first-class ties, more than half of them were second-class, and that defendant was entitled to a reduction of over $5,000 on the ties sued for and to recover about twice that amount on account of ties paid for before the mistake was discovered. Under the practice prevailing in the United States court this defence could not be made in the action at law commenced by plaintiff, but it was necessary to commence a separate suit in equity for that relief, which was done.

The purpose of that suit was to have the inspection of the ties canceled and a correct accounting had of the amount due by defendant. As an incident to that suit the temporary injunction was granted by the court restraining the prosecution of plaintiff's action at law pending the determination of defendant's suit in equity, and in that proceeding the bond sued on was given. The case was referred to Mr. Shannon Douglass as special master, who heard the evidence offered by the plaintiff—this defendant—there was no evidence as to quality of ties offered by the defendant, Elliott, he standing on the technical ground that the inspection previously made was conclusive, and could not be annulled. The master made a report sustaining the contention of the railroad company as to the proportion of first and second class ties, but that Elliott did not
84 know that fact when he furnished the ties, and that there was no evidence of fraud on his part, and that the report of the inspector was conclusive. The railroad company filed exceptions to this report and Judge Philips sustained the same as to the ties sued for by plaintiff, and reduced the amount nearly $6,000, as claimed

by the railroad company—but refused to open up the matter as to the ties previously paid for. Elliott prosecuted an appeal to the U. S. circuit court of appeals which reversed the judgment and remanded the case on June 23, 1896. At the October term, 1896, on October 19, the U. S. circuit court, in accordance with the mandate from the court of appeals, dismissed the equity suit, and ordered the costs to be taxed against the plaintiff—this defendant (Rec., pp. 18 and 68). On October 20, 1896, there was a trial of the action at law brought by plaintiff and judgment in his favor (Rec., p. 55). There were no subsequent proceedings in either of said cases in the U. S. court, and there was never any assessment or adjudging of damages by that court in the equity suit in which the injunction was granted. On the trial of the present case plaintiff's attorney, Mr. Cosgrove, testified that he attended the taking of testimony before the master in the equity case, four days in all, one day in St. Louis, two days in Dallas and one day in Boonville; that afterwards he went to Sedalia to argue the case, but did not do so, and it was submitted on briefs; that after the exceptions were filed he went to Jefferson City for one day in connection with the case, and the exceptions were submitted to Judge
85 Philips on briefs, that a brief was prepared for the U. S. court of appeals, and the case was argued orally, and he estimated the value of the services of plaintiff's attorneys, Mr. Williams and Mr. Cosgrove, for the whole matter, from the time the case started until it ended, including services, printing briefs and expenses in both the U. S. circuit court, and the court of appeals, and before the master, at $2,000 (Rec., p. 41). The difference in the price of the ties, being the amount in dispute, was about $6,000 (Rec., p. 37).

Among the costs taxed in the cases in the United States court were certain amounts for attorneys' fees, in accordance with the practice in the Federal courts. Under the rules of those courts a fee was taxed in the case, and additional fees for each deposition. These amounts were paid to Elliott's attorney for him (Rec., p. 72).

The plaintiff testified that he attended the taking of testimony before the master at every place, and thought his personal expenses must have been two or three hundred dollars (Rec., p. 46).

This is the substance of the evidence. At the instance of plaintiff the court declared the law to be that on the admissions by the parties, the plaintiff was entitled to recover his reasonable personal expenses and reasonable attorneys' fees incurred in procuring the dissolution of the injunction; to this defendant excepted. Defendant prayed seven instructions,—set forth at pages 73 to 75 of the Record, all of which were refused, to which defendant excepted (Rec., p. 75).
86 The first was a peremptory instruction to find for defendant.

The second was that plaintiff was not entitled to recover anything on account of attorneys' fees.

The third was that plaintiff could not recover unless the damages were awarded to him and adjudged in his favor by the court which dissolved the injunction.

The fourth was that plaintiff could not recover his personal ex-

penses incurred in traveling from place to place to attend the taking of testimony concerning the inspection of the ties for which he had brought suit.

The fifth was that having received the amount taxed in his favor as attorneys' fees as part of the costs in the equity suit, he could not recover anything as attorneys' fees, in this case.

The sixth was that he could not recover anything on account of attorneys' fees for services in the equity suit in connection with the issue in regard to the correctness of the inspection of ties nor for the purpose of sustaining the inspection originally made.

The seventh declared that the injunction was a mere incident to the equity case, of which the main purpose was to set aside the inspection of the ties, and that the bringing of that suit, and obtaining the temporary injunction were necessary under the practice in the U. S. court, to enable defendant to make its defense against the claim set up by plaintiff in the action at law brought by him, and that under such circumstances plaintiff was not entitled under any
87 circumstances to recover any attorneys' fees, except such as were necessary and reasonable for the purpose of securing a dissolution of the injunction, as distinguished from the fees for services in relation to the merits of the main purpose of said equity suit.

The motion for new trial was filed in due time, and bill of exceptions filed and appeal perfected.

GEO. P. B. JACKSON,
For Appellant.

88 *Points and Authorities.*

I.

There can be no recovery of damages in an injunction suit except on the injunction bond. The right of recovery depends entirely upon the bond.

St. Louis *v.* St. Louis Gas Co., 82 Mo. 349.
Teasdale *v.* Jones, 40 M. A. 243;
Campbell *v.* Carroll, 35 M. A. 640;
Keber *v.* Bank, 4 M. A. 195.

II.

The law in force at the time the bond is made is to be considered as incorporated in it, and a part of the contract.

Mix *v.* Vail, 86 Ill. 40;
2 Am. & Eng. Enc. of Law, 466;

Where there is no statute prescribing the conditions of the bond, they are determined by the rules of the court and the discretion of the chancellor.

Murfree on Official Bonds, sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
89 Nolan *v.* Johns, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6.
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176, 180.

The bond is a part of the record in the case and of the court in which it is given.

Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Murfree on Official Bonds, sec. 401.

Therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case.

III.

The terms and conditions of the bond sued on must be construed under and determined by either the rules and practice of the Federal courts, or by the statute and decisions of Missouri. On either theory the court erred in rendering judgment for plaintiff in this case.

Viewed as a bond subject to the rules and practice of the Federal courts the judgment was erroneous because:—

a. The principal damage allowed was attorney's fees, which are not considered an element of damages on an injunction bond in a Federal court.

Oelrichs *v.* Spain, 15 Wall. 211.

90 The case of Wash *v.* Lackland, 8 M. A. 122, relied upon as establishing the contrary, does not fairly meet the question. The bond in that case did not contain the same conditions as the bond in the case at bar. Moreover that case wholly ignored the other cases in this State giving the proper construction to be put on the language of the bond, and also the theory of bonds and damages thereon in injunction cases.

b. An attorney's fee was allowed and taxed as costs in the case and paid by this defendant, in accordance with the general practice in Federal courts.

c. No damages were adjudged on the dissolution of the injunction, and under the conditions of this bond there could not be any recovery upon it in any court, or at any time.

2 High Inj., sec. 1656;
Bein *v.* Heath, 12 How. 168;
Deakin *v.* Lea, 11 Biss. 34.

IV.

Viewed as a bond governed by the statute and decisions of this State plaintiff was not entitled to recover. The condition of the bond never happened. The temporary injunction was not formally dissolved, but fell as a necessary consequence of the decision

91 of the U. S. court of appeals, and even when the bill was subsequently dismissed in the U. S. circuit court, there was no effort to have any damages assessed or adjudged. That was the final termination of the case in which the injunction issued, and there has never been any damages adjudged. The language used in this bond has repeatedly been construed by the courts of this State to mean that the damages must be assessed and adjudged by the court which dissolves the injunction, at the term at which it is

dissolved, that is before the court loses jurisdiction over the case, and that unless damages are so assessed there can be no recovery on the bond.

Dorris *v.* Carter, 67 Mo. 544;
Loehner *v.* Hill, 17 M. A. 32; S. C. 19 M. A. 141;
Neiser *v.* Thomas, 46 M. A. 47;
Moore *v.* Bank, 58 M. A. 470;
Corder *v.* Martin, 17 Mo. 41;
Hoffelmann *v.* Franke, 96 Mo. 533;
Lewis *v.* Leahey, 14 M. A. 564.

V.

In any event only such damages can be recovered as are caused by the injunction.

Cases under point IV and
Uhrig *v.* St. Louis, 47 Mo. 528.

92 And attorney's fees for services on appeal cannot be allowed.

Teasdale *v.* Jones, 40 M. A. 243.

The court erred in violating both of these rules.

VI.

While it has been held in several cases,

(Hammerslough *v.* K. C. B. & L. Ass'n, 79 Mo. 80,
Holloway *v.* Holloway, 103 Mo. 274,
Brownlee *v.* Fenwick, 103 Mo. 420, and
Alliance Trust Co. *v.* Stewart, 115 Mo. 244),

that there might be a recovery of entire attorney's fees in some cases, even though no motion to dissolve was filed, yet those were cases where practically the whole controversy was involved in the injunctions, and a hearing on a motion to dissolve was equivalent to a trial on the merits.

The case at bar is not like any of those. Here the injunction was a mere incident to the principal case, arising from a peculiar rule of practice in equity cases in the Federal courts. There was no special proceeding to dissolve the injunction and no special
93 service to accomplish that result. The injunction fell as an incident of the defeat of the plaintiff in that case (defendant here).

Under such circumstances there could be no recovery of attorney's fees on the injunction bond, and the court erred in allowing them.

Anderson *v.* Anderson, 55 M. A. 268;
Banking Co. *v.* Monarch Co., 68 M. A. 603;
Brown *v.* Baldwin, 121 Mo. 126, 136;
2 High Inj. (3 ed.), sec. 1686;
Turnpike Co. *v.* Dulaney, 86 Ky. 516;
See also State *ex rel. v.* Heckart, 62 M. A. 427–430.

VII.

There must be affirmative evidence by plaintiff to establish all the conditions necessary to entitle him to recover on an injunction bond.

Lochner *v.* Hill, 17 M. A. 32–35.

VIII.

Plaintiff is not entitled to recover his personal expenses in attending the taking of depositions. That was not an expenditure necessary to a dissolution of the injunction, and under no circum-
94 stances was it necessary to spend from to three hundred dollars on a trip of one day to St. Louis and two days to Dallas.

IX.

For the above reasons the court erred in giving the instruction asked by plaintiff and in refusing those prayed by defendant.

GEO. P. B. JACKSON,
For Appellant.

95 *Argument.*

I.

This being an effort to recover damages on account of expenses incurred in connection with an injunction suit, the plaintiff can only recover upon the injunction bond. There is no pretense of malice or want of probable cause in the suit in which the injunction issued. Therefore, the plaintiff's right rests solely and entirely upon the bond which was given in that case. This is established by the cases cited under point I of the brief, to which are added Iron Mountain Bank *v.* Mercantile Bank, 4 M. A. 505 and 2 High on Inj. (3d ed.), sec. 1648. The plaintiff recognizing this as the correct rule has brought his suit upon the bond, and although he has sued only the principal without joining the surety, it is none the less an action upon the bond, and it is none the less true that the only action he could bring is the one which he has brought on the bond.

Since his action must be upon the bond, the measure of his right of recovery is to be ascertained from the conditions of the bond. Unless there is a breach of some condition in the bond, there is no right to recover anything. There is no difficulty in ascertaining what the bond says, but there is a dispute as to the correct interpretation of the language used, and of the effect of it. This dis-
96 pute arises chiefly from supposed differences in the law and rules of practice applicable respectively to the State and Federal courts. As the bond sued on was given in the course of proceedings in a case in the United States court, and as a step in that case the defendant contends that it is to be governed by the rules of practice and the decisions of the Federal courts, while on the other hand the plaintiff's contention is that although it was given in such case, yet when he sues upon the bond in a State court

he may ignore any of the rules of practice or decisions in that court that are in his way and recover by virtue of the law of the State applicable to analogous bonds given under the State statute. At the same time he insists that the case is not to be governed by the State statute in those particulars where the statute or the decisions of the State court thereon would preclude his recovery. The court below adopted the plaintiff's view and rendered judgment against the defendant for the amount of damages claimed instead of the penalty of the bond. It will be noticed that the conditions of this bond are in form similar to those prescribed by our State statute, and that it is provided in the bond as follows:—

"Now if the said Missouri, Kansas & Texas Railway Company will abide the decision which may be made in said case number 2092 and upon said injunction, and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation shall be void; otherwise to remain in full force and effect."

97 It was conceded upon the trial of this case, and it is so shown by the record that there never was any adjudging of any damages on account of the dissolution of the injunction. There were certain costs adjudged against this defendant as plaintiff in the injunction suit, but it is conceded that they were all fully paid. There, therefore, can be no breach of the bond unless this defendant has failed to pay damages which have been adjudged against it, and as it is conceded that no damages had been adjudged by any court in any proceeding prior to the institution of this suit, it was necessary for the court below to determine, as it is necessary for this court to now determine, what this language means as to the time and place of adjudging damages. The court below concluded that it was sufficient if it, in trying this case, which was founded upon a supposed breach of the bond, should adjudge damages. It would seem that, without any careful examination of the general principles involved in such cases, this conclusion of the court below was wrong. Since the suit was for a breach of the bond, and since the only breach there could be is the failure to pay such damages as should be adjudged, there certainly could be no breach which would give a cause of action until after damages were adjudged, and therefore the method of reasoning of the court below resolved itself into this: that by the final judgment in this case it adjudged the damages, which action by this court was the circumstance upon which the condition of the bond required the principal in the bond

98 to make a payment, the failure to do which constitutes the breach which is the cause of action here sued on. Therefore the very initial step of the cause of action is only brought into existence by the final adjudication of this case rendering a judgment against the defendant on account of the breach of a bond which could not have occurred until this final judgment was rendered.

The Supreme Court of the United States has passed upon identically the same question presented in this case and has ruled against the plaintiff. In *Bein v. Heath*, 12 How. 168, a bond which had been given in an injunction suit in the Federal court was sued upon.

As in the case at bar, the bond contained the condition provided by the State statute, which was practically, although not identically, the same as ours. That bond was conditioned to pay "all such damages as the obligee may recover against us." In the case at bar the condition is that the plaintiff in the injunction suit should "pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved." These are practically equivalent conditions. In that case the Supreme Court of the United States held that there was no breach of the bond until there had been a recovery upon it, and consequently no action could be maintained on such bond. As the opinion bears so directly and so fully upon the case at bar, I set forth that part of it following the statement of facts, as follows:—

"Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of
99 the United States, to the laws of the State. The proceeding in a circuit court of the United States in equity is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress. And the 90th rule declares that, when not otherwise directed, the practice of the high court of chancery in England, shall be followed. The 8th rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties. And when an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the
100 time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit.

"But the bond, in the case before us, is not one to pay the

damages which the opposing party should sustain by reason of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned. A court proceeding, according to the rules of equity, cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the circuit court in the former suit between the parties. No judgment was or could be given against the obligors for debt or damages, and none were recovered against them previously to the institution of this suit.

"The contingency on which they agreed to pay, has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it. It would be against the well-established rule of the chancery court to extend the liability of the surety, by any equitable construction, beyond the terms of this contract. And, in a proceeding upon the bond, the liability of the principal obligor cannot be extended beyond that of the surety."

This case was followed in Deakin *v.* Lea, 11 Biss. 34. In that case the Federal court treated the bond drawn in the form provided by the State statute, as it would be construed by the State
101 courts; that is, the bond was to be governed by the rules of the court where it was given. The circumstances attending the giving of this bond were similar to those in the case at bar, and this court held that there could be no recovery because such a bond must be construed to mean that the obligor would pay the damages adjudged by the court which dissolved the injunction at the time it was done. This rule is approved by Mr. High in his work on Injunction. Under these authorities, I submit then that there was never any breach of the condition of the bond sued upon which authorized the suit.

Another objection to the judgment of the court below is that attorneys' fees are not an element of damage upon bonds given in the Federal courts, and therefore the plaintiff was not entitled to recover in this case.

An injunction bond is as much a part of the proceeding in a court as any other act that may be done in a case, and while the bond may be sued on in any other court, yet the rights and liabilities arising upon it ought to be determined from the terms of the bond itself with reference to the rules of law and practice governing the court by which the bond was required. It is settled by the authorities cited under Point II of the brief that the law in force at the time an injunction bond is given is to be considered as incorporated in it, and as part of the contract. This is a general rule applicable to all contracts. And it has also been decided that where there is no statute prescribing the conditions of a bond, they are to
102 be determined by the rules of the court in which the bond is given or by the discretion of the chancellor. So much is the bond a part of the proceeding in the particular court that it is re-

garded as a part of the record in that case. In the case at bar the plaintiff sued upon a copy of the bond because the original was a part of the records of the Federal court at Jefferson City, where it still remains. The bond is so far governed by the statute or the rules of practice governing the court in which the bond is given that any conditions or obligations beyond those required by the statute are void, and will not be enforced. This was so held by the St. Louis court of appeals in Rubelman Hardware Co. *v.* Greve, 18 M. A. 6, and by this *the* court in Nolan *v.* Johns, 27 M. A. 502. As there is no statute regulating injunction bonds in the Federal courts the rules and practice in those courts take the place of the statute, and every one giving a bond of that character in the United States court is to be considered as having made the bond with reference to the liabilities and subject to the conditions established and recognized by such rules and practice. The promulgated rules and the rules of law established by the decided cases in those courts must be understood to be incorporated in and to become a part of the contract evidenced by the bond, and therefore the obligation of the maker of the bond or the right to recover by the defendant in the injunction suit is to be determined by the measure of liability or right created and recognized by the rules and decisions of the Federal courts, and not by the statute of a State
103 designed to regulate similar bonds given in the State courts.

I suppose it will not be disputed that if the measure of liability on this bond is to be ascertained by the rules and the law governing the court in which the bond was given, then the plaintiff should not have recovered and the judgment should be reversed. In the first place, it will be noticed that the principal amount of damage claimed was on account of attorneys' fees, whereas in the Federal courts attorneys' fees are not considered an element of damages on an injunction bond. Since that is the law of Federal courts, and since the law of that court enters into and forms a part of the contract of a bond given in such court, it necessarily follows that any condition in that bond for the payment of damages did not contemplate the payment of attorneys' fees which by the law of that court was not considered an element of damage at all. If there is any meaning in the authorities cited under the first and second points of the brief, then there is no logical theory upon which to say that this defendant or its sureties entered into the contract embodied in the bond intending or expecting that it in any manner obligated them to pay as damages something which the very court, in response to whose order the bond was given, declared was not an element of damages in such case. Moreover the law, and the practice of that court, which entered into this bond and became a part of it, did provide for certain attorneys' fees, but which were to be assessed and taxed as costs in the case. The proof shows that in ac-
104 cordance with this practice attorneys' fees were taxed as costs and were paid by this defendant before this suit was brought. Upon what theory then can it be said that, when the law and the rules of practice in the Federal court provide for the taxation of certain attorneys' fees to be paid as costs in the case, and repudiate

the right of any one to consider attorneys' fees as an element of damages on an injunction bond, the makers of such bond obligated themselves to pay the attorneys' fees as damages upon the bond, or that a bond made under such circumstances would give the obligee the right to go into some other court and recover as damages those attorneys' fees in violation of the law which entered into and became a part of this contract at the time the bond was made. On the trial below the plaintiff relied upon the case of Wash *v.* Lackland, 8 M. A. 122, as authority for including attorneys' fees in such case. It is undoubtedly the fact that in that case the St. Louis court of appeals did decide that although the bond there sued on was given in a Federal court, there could be a recovery of attorneys' fees as damages in accordance with the practice prevailing as to bonds given in Missouri, but I submit that an examination of that case will disclose a lack of any satisfactory reasoning leading to that conclusion. The court wholly ignored the nature of the obligation of an injunction bond; that it was a part of a proceeding in the particular court in which it was given; that the law governing the court in which it was given is to be considered as incorporated in and as a part of the bond, etc.

105 The unsoundness of the reasoning of that case will be disclosed by a consideration of the following clause:—

"There was no stipulation in the bond that it should be sued on in a Federal court. While it is but natural and proper to suppose that the Federal tribunals would adhere to their former rulings, there is yet no guaranty to that effect in the contract. We therefore fail to perceive that the makers intended to create only such obligations as attach under the Federal jurisprudence. The interpretation of a contract belongs to the court before which it is pending."

In the first place, it is wholly immaterial in what court the bond may be sued on, yet this seems to be made a decisive question by the St. Louis court of appeals. The real question is where was the bond made? The significance of any stipulations in a bond is determined by the circumstances surrounding the making of it, and not those present at the time of suing upon it. For instance, in the case of Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503, an injunction bond given in the State of Arkansas was sued on in the State of Tennessee, and the court of the latter State held that the Arkansas statute would control, although the court said that the statute really only affected the remedy; and again in the case of Mix *v.* Vail, 86 Ill. 40, and in Murfree on Official Bonds, sec. 389, it is held that injunction bonds cannot be affected by laws passed subsequent to their execution. This seems to be too elementary to require further citation of authorities, and since this and other courts have decided that in effect the

106 rules of practice in equity have an equivalent force to statutes governing the practice in such cases, and since as to such questions the relation of the Federal and State courts is similar to that existing between the courts of different States, the only logical conclusion is that the laws and rules of practice in force at the time in the jurisdiction when and where the bond was given are the essential things which are to control, and not the fact that the bond

may be sued on in one court or another, and therefore the language already quoted from the St. Louis court of appeals shows a disregard of the real principles, and that the matters which the court there suggested as reasons for its conclusion were wholly insufficient. In other words, it is immaterial whether there was a stipulation that the bond should be sued on in a Federal court or not, because not the place where the suit was brought, but the law of the place where the bond was made measured the liability. Nor is it material whether there was any subsequent change in the rulings of the Federal court or for that matter any change in the statutes of the State, because it is not any subsequent changes of the law, whether it rest in statute or in decision, that are to control, but the rule of law existing at the time the bond was made. The St. Louis court of appeals said that the interpretation of the contract belongs to the court before which it is pending. Undoubtedly that is true, but it is very evident that the court in that case made a serious mistake in undertaking to interpret the contract as though it had been made in a State court instead of a Federal court.

107 While the court where the suit was brought must interpret the contract, yet it must interpret it according to established rules, one of the fundamental ones being that a contract is to be governed by the law of the place where it is entered into. As already shown, there is as much distinction between the jurisdiction of a Federal and a State court as there is between the courts of two States. The contract should have been interpreted therefore according to the circumstances as governed by the law of the Federal court where the bond was made, and not according to the law of the State court where it was sued upon, which under no circumstances could have entered into the minds of the parties at the time the contract was made. It would be equally logical with anything suggested by the St. Louis court of appeals if we should now inquire: Was there any stipulation or assurance that this bond would be sued upon in the State court, so that it might be interpreted as the court did interpret it? It will be seen at once that the reasoning of that court resolves the case into a contract which has a variable signification. If it is sued upon in a Federal court, it is interpreted as though the parties expressly stipulated that they would not pay any attorneys' fees by way of damages, while if the same bond was sued upon in a State court it is to be interpreted as meaning that the parties expressly stipulated that they would pay such attorneys' fees by way of damages. Courts may differ in construing the same contract, but the parties only mean one thing, and one court

108 or the other makes a mistake if they do not agree as to what the contract means. It is manifest that a decision is erroneous which intentionally and necessarily puts a contract in the position of being susceptible of one meaning in one court and of a different meaning in another. The mistake that the St. Louis court of appeals made in that case was that it disregarded a fundamental law of contracts. It disregarded the intention of the parties. It disregarded the law governing contracts at the place where that bond was made, and, by subsequently injecting other conditions and

different rules of law into the contract at the time the suit was brought upon it, it reached a wrong conclusion. The decision seems to rest not so much in the reasoning of the court itself, as in this statement:—

"It is settled in Missouri that attorneys' fees paid in defense of an injunction suit may be recovered as damages in an action on the injunction bond, and this although the bond was given and the injunction obtained in a Federal court."

And then follows the citation of several cases to which we ask the attention of the court in order to show that they absolutely furnish no authority for the statement made by the St. Louis court of appeals. Only one of them, R. R. *v.* Shepley, 1 M. A. 254, at all touches upon the question. In that case the decision was based upon the statement that "a bond of this kind is to be governed by the rules that govern the interpretation of any other contract. If the obligor when executing it, knew that, under a ruling — the Supreme Court of the United States, he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the supreme court of the State of Missouri upon the same obligation in a similar proceeding he would be held for counsel fees in case of failure to maintain his injunction."

This, as it will be seen, ignores the occasion of the making of an injunction bond and all the rules of law entering into the same. What has been said in regard to the former case may be repeated here, and nothing is added to the logic of these cases by citing the one in support of the other.

As to the other cases cited in Wash *v.* Lackland, it it only necessary to make the following reference to them:

State *ex rel. v.* Beldsmeier, 56 Mo. 226, was an action on attachment bond and only held that a party might sue on the bond without having filed a plea in abatement.

Barnes *v.* Webster, 16 Mo. 258, was a suit on a bond given in an attachment suit, conditioned to pay all damages that might accrue,—held suit could be maintained to use of a garnishee, and though the bond was not authorized by any statute it was good as a common-law bond, and though made to the United States instead of defendant, he could maintain suit by United States to his use.

Leisse *v.* R. R., 2 M. A. 105, does not in any manner involve any question concerning an injunction or a bond given in a Federal court. It was an action to recover damages for the institution of proceedings to condemn private property, and it was held not necessary to have actually paid out money for expenses incurred.

III.

But even upon the theory of the court below, it was inconsistent in its decision. If it was justifiable to ignore the law of injunction bonds in the Federal courts and resort to the law governing bonds given in State courts, in order to determine the defendant's liability in this case, then the court should have been consistent, and should have applied the State law throughout. If the court in which the

suit is brought is to determine what law shall govern the contract of the parties then it must govern it in one respect as well as in another, and if the court could properly turn to the law of the State which says attorneys' fees are an element of damages upon an injunction bond, then it must decide the case with reference to the other features of the State law concerning injunction bonds. Here was a bond given in the form of the State statute, although it is true it was given in a Federal court. The court below ignored the fact that it was given in the Federal court, and rendered its judgment solely with regard to the State law. The judgment, we submit, was therefore wrong for another reason, namely, that there had been no damages adjudged before the institution of this suit by the court which dissolved the injunction. In the cases cited under point IV of the brief it is decided

111 that the condition provided by the statute of Missouri, and which was inserted in the bond sued on, means that the parties to the bond have obligated themselves to pay such damages as may be adjudged by the court which dissolves the injunction upon a motion therefor filed at the same term at which the injunction is dissolved, and unless there is such an adjudging of the damages there can be no recovery upon the bond. The evidence in the case establishes that there was no special order dissolving the injunction in this case; that it was only dissolved upon the final determination of the case in favor of the injunction defendant, the plaintiff here. That that occurred at the October term, 1896, of the United States circuit court (Rec., p. 68). Since that time there has never been any farther proceeding in that case in that court, nor is there any pretense that there was ever any effort to adjudge any damages on account of the injunction in question except in this suit and in the judgment now before this court on appeal. I submit, therefore, without farther argument, that the case in that respect does not present those conditions which the courts of this State have invariably held are essential to a recovery upon an injunction bond conditioned as provided by the State statute, and if we are to ignore the law of the Federal courts and determine this case according to the law of the State relative to injunction bonds, then the plaintiff is without a cause of action, because there were never any damages adjudged by the court which dissolved the injunction.

112 IV.

Moreover, there is another rule of law applicable to injunction bonds, both in the Federal and the State courts, which renders the judgment in this case erroneous. It is well settled that it is only damages caused by the injunction which can be recovered, and that even where attorneys' fees are considered a proper element of damages upon an injunction bond, such fees upon an appeal cannot be allowed. That has been decided in this court. Yet in the case at bar Mr. Cosgrove, the plaintiff's attorney, who estimated the amount of the plaintiff's damages, said that in reaching his conclusion he estimated the services of Mr. Williams and himself at $2,000, and that in doing so estimated the services "in the case from the time

that it started in the United States circuit court until it ended in the same court at Jefferson City, including services, printing briefs and attorneys' expenses in both the circuit court and the United States court of appeals and before the master—the whole labor done in the case." (Rec., p. 41.)

This shows such a palpable violation of the rule governing damages that there can be no question about the error committed in this respect. I do not overlook the fact that in several cases mentioned on page 12 of the brief the supreme court has held that an attorney's fee for an entire case in the State court might be allowed as damages upon an injunction bond. These cases upon examination, however, will be found to be wholly different from the case at
113 bar. In those cases the statement is made by the court that the general rule is that the damages to be allowed are such only as are the actual and proximate result of the restraining order and that cases may arise when it may be proper to distinguish between fees for defending the principal case and for dissolving the injunction, but the court found in those cases that the whole case was involved in the injunction, and that a motion to dissolve involved a trial of the merits of the case. In those cases the injunction was not incident to the main case, but it was the chief purpose of the case, and therefore a motion to dissolve brought up for trial the entire issue in the case and involved the expense of the whole attorney's fee, so the court might well say in such cases the entire attorney's fee could be allowed. But where, as in the case at bar, the injunction was a mere incident of the main case, and was really never heard of from the time it was granted until the final decree in the case, there certainly should be a distinction between the attorneys' fees for the services in the whole case, and any fee that might be considered as having been occasioned by the injunction. There was no motion to dissolve in this case. There was no real resistance to the injunction in this case. As a matter of fact it went of course under the practice in the Federal court. The only question raised upon the application for the injunction was that the plaintiff in that case (defendant here) should be required to pay a certain amount admitted in its bill, which order the court made. The record
114 in this case fairly establishes that there was no expense by way of attorneys' fees imposed upon this plaintiff by reason of the injunction independently of such fees as he became liable for on the main case.

V.

A still more fatal point to the plaintiff's case, however, arises out of this incidental character of the injunction. In the case of Anderson *v.* Anderson, 55 M. A. 268–275, this court held that it was only attorneys' fees for dissolving an injunction that could be allowed, and where the fees were incurred in trying the case on the merits of the main controversy and upon a judgment for defendant upon that issue, the injunction fell with it and there could be no recovery for attorneys' fees. And again in the case of Banking Co. *v.* Monarch Co., 68 M. A. 603, this court reaffirmed the ruling in the previous

case, although the cases relied upon by the plaintiff and mentioned at page 12 of our brief were expressly cited by counsel in that case. This is the rule laid down by 2 High on Inj., sec. 1686, and is the effect of the case of Brown *v.* Baldwin, 121 Mo. 136, as well as of the other cases cited in the brief.

That the injunction is a mere incident in this case ought to be apparent from a mere statement of the case. It will be remembered that the present plaintiff first instituted a suit to recover a large amount of money on account of ties furnished and inspected under a certain contract with the defendant. If that case had remained in the State court the defendant could have set up in the law case its equitable defense, which
115 was necessary in order to accomplish the relief which it sought, namely, to have the inspection of the ties corrected by reason of fraud and mistake. But the case having been removed to the Federal court it necessarily was filed there as an action at law upon the plaintiff's demand for the money claimed to be due him on the sale of the ties. An equitable defense could not under the practice of the Federal courts be interposed in that case, and the defendant was driven to the necessity of filing a bill in equity in order to present its case for equitable relief. The practice in that court is farther to ask an injunction restraining the prosecution of the action at law pending the trial of the suit in equity. That suit in equity was not primarily to obtain an injunction against the defendant for any purpose, but its main and sole object was to have certain inspections of ties vacated for the reasons alleged in the bill, and to have a correct accounting of the amounts due between the plaintiff and defendant. That there was an injunction restraining the prosecution of the action at law between the same parties was but the merest incident to that suit in equity. If there had been no injunction there would have been the same reference to the master, the same trial, the same taking of testimony, the same preparation of briefs, and the same arguments that there were in the case as it stood. The injunction did not add to the labor in any respect. Everything that was done was necessary, and would have been necessary if there had been no injunction. In fact, as already suggested, the injunction was not noticed from the
116 time it was granted until the final determination of the suit after an appeal. There was never any motion to dissolve. The injunction was lost sight of. At least it drifted along to finally be determined as an incident of the final decree in the case. The chancellor in the United States circuit court rendered a decree in favor of this defendant (complainant in that equity proceeding), and from that an appeal was prosecuted. The United States circuit court of appeals reversed the judgment of the circuit court, and remanded the case for further proceedings in accordance with its opinion. It said nothing about dissolving the injunction. Subsequently the case was called up in the circuit court and a decree rendered dismissing the bill. As a matter of fact no more was done than to present the mandate from the court of appeals, and it was ordered that the bill be dismissed. Then in writing up the

decree, as a mere incident to the dismissal of the bill, it was said that the injunction was dissolved. That the matter of injunction was of so little importance that it did not receive consideration at that time is most manifestly evident from the fact that no effort was made to have any assessment of damages. Most clearly the eminent counsel upon the other side were aware of the construction which had been put upon the language used in this bond, and were familiar with the decisions of this State to the effect that there must be an adjudication of the damages by the court which dissolved the injunction, and at the term at which it was dissolved. This escaped attention. Nothing of the sort was done. The
117 injunction was not then a matter in the mind of any one, and as a mere incident to the final decree in favor of the defendant, either the clerk or whoever else prepared the form of the entry, inserted the clause dissolving the injunction. Nothing could be more incidental in its character than the injunction in this case. It simply fell with the final decree in the case, and therefore, under the decisions of this court in the cases cited in the brief, there can be no recovery of attorneys' fees on the injunction bond. The decisions of this court cited under this point are conclusive of the case, and necessitate an absolute reversal.

VI.

It is not necessary to say more, yet it may not be inopportune to call attention to another feature of the testimony. The plaintiff himself testified that he had incurred personal expenses to the amount of $200 or $300 in traveling around with his attorneys. He did not keep any very close account of his expenses, but he supposed he must have spent $200 or $300. The testimony of Mr. Cosgrove, the attorney, was that he made a trip of one day to St. Louis and of two days to Dallas, Texas, and Mr. Elliott accompanied him on these trips. If we allow ample time for him to travel from his home in Boonville and to return on each of these trips, and allow him liberally for the most luxurious methods of travel, it will be difficult to conjecture how he could have legitimately spent $200 or $300 in making those trips. Certainly the demand is so vague
117½ and is so grossly unjust that the court erred in allowing it as an element of the damages in this case under any view it might have taken. But when we consider that the trips that he made, even conceding that it was necessary for him to accompany his attorney, related entirely to the taking of testimony upon the merits of the main case; that is, in regard to the character of the ties and the circumstances attending the inspections which were objected to, we must reject this element of the damage because it was not that which pertained to a dissolution of the injunction. The depositions taken in St. Louis and in Dallas were taken by the plaintiff in that case (defendant here) to present evidence which would overthrow the good faith and validity of the inspections of the ties. It was to watch this testimony and to cross-examine the witnesses that the plaintiff Elliott and his attorney attended at those places. That was expense in connection with the main case, and

wholly independent of the injunction, and therefore no part of it could be allowed as damages upon the injunction bond under any theory of the case.

For the various errors before pointed out, we submit that the judgment of the court below is without any support in law, and that it must be reversed absolutely.

GEO. P. B. JACKSON,
For Appellant.

118 And thereupon, in due time, the said respondent, John S. Elliott, filed his brief in said case in words and figures as follows, to wit:

119 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS R'Y CO., Appellant. } No. 5065.

Respondent's Statement and Brief.

John Cosgrove, attorney for respondent.

120 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS R'Y CO., Appellant. } No. 5065.

Respondent's Statement.

The facts stated in historical order are as follows:

Respondent commenced a suit in the circuit court of Cooper county, Missouri, returnable to the September term, 1892, of said court, against the appellant herein, to recover the sum of $48,528.62; the same being for the unpaid purchase price of railroad cross and switch ties sold to the appellant under contract during the previous portion of said year, 1892. The case was, upon the petition of the appellant, removed to the central division of the western dis-
121 trict of the United States circuit court of Missouri. After the case had been removed to the Federal court, respondent herein amended his petition, reducing his claim $36,759.73 in consequence of a payment made to him after his suit was commenced in the State court. After the cause had been certified to the United States circuit court the appellant filed in said United States court its bill in equity to restrain and enjoin the respondent from the prosecution of his said suit at law.

The bill admitted that there was due to the respondent in said lawsuit of the amount claimed by him only $18,500. The United States circuit court required, as a condition precedent to issuing the injunction, that appellant should pay the respondent within a specified time $12,000 of his claim, and thereupon granted a temporary injunction restraining the respondent from further prosecution of

his said suit at law. The order granting the preliminary injunction required the appellant to enter into a bond in the sum of $20,000, payable to the respondent, to indemnify him as required by the rules of equity practice. The appellant did enter into said bond, which provided that it should "pay all sums of money, damages and costs that shall be adjudged against it, if the said temporary injunction shall be dissolved."

The equity cause was numbered on the United States court docket 2092, and the law cause, the prosecution of which was enjoined, was numbered 2082 on the law docket of said United States circuit court. Shannon C. Douglas, Esqr., was appointed as special master and examiner to take the testimony in the equity suit. The respondent, in his answer in said equity suit, denied the equities of the bill and asked for a dissolution of the injunction and
122 that the bill be dismissed. The testimony was taken in said equity suit at St. Louis, Missouri, Dallas, Texas, and Boonville, Missouri. The parties met at Sedalia, Missouri, after the testimony had been taken by the master for the purpose of arguing the question before him. The case was not then argued before the master; briefs were made and case argued on both sides subsequently. The master made his report and found that the respondent was entitled to recover the full amount of his claim and interest as prayed in the suit at law. The appellant filed twenty-seven exceptions to the master's report. Briefs were made on both sides and the exceptions argued on printed briefs before Judge Phillips, who sat at circuit. The exceptions were in part sustained and the amount found by the master as due respondent was reduced about $46,000; the temporary injunction, previously granted, restraining the prosecution of the suit at law, was made permanent "respecting the subject-matter involved in the equity case." The master was allowed $700 for his services and the same was taxed as costs in the equity suit and respondent was adjudged to pay one-third of all the costs in said suit. From the decree so entered in the United States circuit court, respondent sued out a writ of error and removed the cause to the United States court of appeals, where the decree of the circuit court was reversed and the case remanded to the lower court with directions to dismiss the bill with costs.

On October 19th, 1896, the circuit court of the United States at Jefferson City entered its order and decree that "the injunction heretofore granted be, and the same is, dissolved," and the order sustaining the exceptions to the report of the special master was set aside and the complainant (appellant's) bill dismissed with costs, etc. It will be seen that the injunction was "dissolved."

123 The respondent instituted this suit in the circuit court of Cooper county at the October term, 1897, to recover the value of his attorneys' fees and his personal expenses in procuring a dissolution of the temporary and permanent injunction issued against him in said equity suit in the United States circuit court. The amount of damages claimed were $1,800 attorneys' fees and $200 for his personal expenses; in all $2,000. A jury was waived and the cause was tried before the court and judgment was rendered for the respondent

herein for $2,000. The evidence is printed in full in the abstract filed in this court by appellant. It appears from the evidence that appellant, in its bill in equity, admitted that it owed the respondent not to exceed $18,500 of the $36,594.73 claimed by him. The circuit court of the United States required the appellant herein, as a condition precedent to the granting of the preliminary injunction, to pay $12,000 within a specified time. This left $24,959.73 still due the respondent, with interest.

The order of the United States circuit court, however, restrained the prosecution of the suit at law for the full sum of $24,759.73. The evidence shows that the real controversy arose over the right of the appellant to have any restraining order at all. The value of the services of respondent's attorneys *were* admitted to be reasonable for the amount of services rendered; the question of the value of services and the reasonableness of the charges for attorneys' fees and respondent's personal expenses *were* submitted to the court upon the evidence, and also the question as to whether the labor performed and the expenses incurred were in a proper attempt to get rid of the injunction and restraining order. The trial court found both
124 of the issues for the respondent. The appellant filed its motion in due time asking for a new trial, and took proper steps to bring the case here by appeal to reverse the judgment of the trial court.

125 *Respondent's Brief.*

I.

The bond was conditioned for the payment of such "damages and costs as might be adjudged." When the United States circuit court "dissolved" the injunction and dismissed the appellant's bill without decreeing any damages, the order of dissolution made appellant liable for all damages sustained by the respondent, and he may recover them in any court having jurisdiction of the parties.

High on Injunctions, 1st ed., sec. 969.
Wash *et al. vs.* Lackland, 8 M. A., 122.
Sutherland on Damages, vol. 2, sec. 524, (2nd ed.)
Meyers *vs.* Black, 120 U.S., 642.

II.

Personal expenses or attorneys' fees paid or contracted in procuring the dissolution of an injunction may be recovered in an action upon the bond if the injunction was improperly or wrongfully sued out.

High on Injunction, sec. 973 (1 ed.).
H. & St. J. R'y *vs.* Shipley *et al.*, 1 M. A., 254.
Hammerslough *vs.* K. C. B. L. & S. Ass'n, 79 Mo., 87.
Brownlee *vs.* Fenwick, 103 Mo., 430–431 loc. cit.
The Alliance Trust Co. *vs.* Stewart *et al.*, 115 Mo., 236.
Holloway *vs.* Holloway, 103 Mo., 274.

126 III.

The respondent was compelled to do every act here performed in order to procure the dissolution of the injunction. Had it not been for the injunction he could have gone on with his suit at law and recovered his debt. The equity suit would have been ineffectual had there been no injunction restraining the respondent from the exercise of his legal rights. The personal expenses and liability for counsel fees incurred by respondent were necessarily made in procuring the dissolution of the injunction and the appellant is liable for them if they are reasonable.

Hayden *et al. vs.* Sample, 10 Mo., 215, *loc. cit.*
Bolling *vs.* State, 65 Ala., 417.

(*a.*) This is true notwithstanding the dissolution did not occur until the final hearing.

Andrews *vs.* Glenville Woolen Co., 50 N. Y., 282.
Misner *vs.* Bullard, 43 Ill., 477.
Ryan *vs.* Anderson, 25 Ill., 372.
Steel *vs.* Thatcher, 56 Ill., 257.
Trapnell *vs.* McAfee, 77 Am. Dec., 158, and note, where the cases are fully reviewed.
Raupman *vs.* City of Evansville, 44 Ind., 392.

IV.

The statute of this State (R. S. 1889, sec. 5500) requires that damages shall be assessed upon the dissolution of the injunction. This does not deprive respondent of his right to sue on the bond.

127 The statutory remedy is not exclusive, especially when the injunction bond was given in the Federal courts.

H. & S. T. J. R'y Co. *vs.* Shipley *et al.*, 1 M. A., 254, *supra.*
Wash *vs.* Lackland, 8 M. A., 122, *supra.*
Meyers *vs.* Block, 120 U. S., 642, *supra.*

V.

Appellant is liable for all damages sustained by respondent in consequence of the suing out of the injunction, which he necessarily incurred in procuring a dissolution thereof, although by the rules of the Federal courts no such damages as are claimed by respondent are allowed by the rules of those courts. It does not follow that appellant is not liable for the attorneys' fees and personal expenses of respondent in procuring a dissolution of the injunction because they could not be recovered in the court where the bond was given. Appellant's contention would make an injunction bond, a bond for the costs of the suit only. "It will not be assumed because the Federal courts did not allow such fees that the sureties contracted with that rule of law in view." Nor is the amount to be recovered

to be limited to the rate at which the fees would be taxed as costs in the Federal courts.

3 Sutherland on Damages, pp. 1110 and 1111.
Mitchell *vs.* Hawley, 79 Cal., 301.
Aiken *vs.* Leathers, 40 La. An., 23.
Wash *vs.* Lackland, 8 M. A., 122, *supra.*
Meyers *et al. vs.* Black, 120 U. S., 642, *supra.*

128 VI.

The dismissal of the appellant's bill in the United States circuit court *ipso facto* dissolved the injunction.

High on Injunctions, sec. 888, (1 ed.)

(*a.*) The real question in controversy in the Federal courts was whether the appellant was entitled to an injunction restraining respondent from the prosecution of his suit at law. It was finally decided by the United States circuit court that there was no equity in the bill of complaint, and the injunction was dissolved. The circuit court of Cooper county did not commit any error in rendering judgment for the respondent for reasonable value of his attorney's fees, and his necessary personal expenses in procuring a dissolution of the injunction in the United States courts, and the judgment of the trial court should be affirmed.

2 Sutherland on Damages, sec. 525, (2nd ed.)

VII.

The bill in equity filed by appellant in the circuit court of the United States against the respondent prayed that he be required "to file a true and separate answer to the several matters herein set forth, as if the same were hereby repeated paragraph for paragraph, but not made under oath, which is waived."

The respondent answered said bill in equity as prayed, and asked in his answer that the injunction awarded against him on the 25th day of October, 1893, be dissolved and said bill be dismissed
129 with costs. The answer was equivalent to a motion to dissolve.

Adams *vs.* Henderson County Bank, 2 Stockton & Chaney Reports, (N. J.) 535.
High on Injunctions, 3rd ed., sec. 1604.

(*a.*) The United States circuit court could have dissolved the injunction upon filing the answer, or continued it to the final hearing on the merits.

10 Am. & Eng. Enc. Law, p. 1016.

VIII.

The reasonableness of the charges for attorneys' fees and personal expenses was submitted to the trial court, and that court found the issue in favor of respondent.

There was evidence to sustain the findings of the trial court, and

this court will not reverse the judgment where there was substantial evidence tending to support the findings of the trial court.

Griffith *vs.* K. C. Material & Con. Co., 46 M. A., 545–'6, loc. cit.
McCartney *vs.* State Ins. Co., 45 M. A., 373.
Turner *vs.* Gibbs, 50 Mo., 556.
Peacock *vs.* Nelson, 50 Mo., 256.
Hayner *vs.* Crow, 79 Mo., 293.

IX.

The trial court did not err in refusing instruction number seven asked by the appellant. The last part of said instruction asserts an abstract principle of law; that may be conceded to be correct as such, but it would have been error to have given it in this case. The case was fairly tried, and the judgment was for the right party and should be affirmed.

130 *Argument.*

Respondent Elliott, in the year 1892, instituted suit in the circuit court of Cooper county to recover from the Missouri, Kansas & Texas R'y Co. an indebtedness due to him for railroad ties sold to and accepted and used by said railway company. They were inspected, as received, by the inspector chosen by the parties. The railway company elected to change the forum for the trial of the cause to the Federal court. This it did of its own motion, and was in accordance with its right. When the case reached that court the defendant had no answer to make to the suit, and plaintiff was clearly entitled to his judgment. Defendant railway company there instituted a proceeding in equity in the United States circuit court for an injunction restraining respondent from prosecuting his action at law. If this became necessary by reason of the practice in that court the necessity was of the defendant's own choosing. The removal to that jurisdiction was on its own motion, and with the benefits it must accept the burdens arising therefrom.

The court as a condition precedent to granting the temporary injunction required a bond in the sum of twenty thousand dollars, conditioned as follows: "Now if the said Missouri, Kansas & Texas Railway Company will abide the decision which may be made in said case number 2092, and upon said injunction, and shall pay all sums of money, damages and costs that shall be adjudged against — if said temporary injunction shall be dissolved, then this obligation will be void, otherwise to remain in full force and effect."

131 The defendant seems to argue that this was a mere formality to comply with the "practice of the court." This can hardly be conceded; the bond was manifestly required for a purpose, and an important purpose, so far as respondent is concerned; it became essential to respondent that this injunction so obtained should be dissolved before he could prosecute his suit to final judgment. The injunction tied his hands and he could not proceed to collect his debt with that standing in his way; he then had to employ counsel

and take the proper steps to dissolve this restraining order; to accomplish that, and for that purpose only, he was compelled to have a trial before the special master, before the circuit court upon the coming in of the master's report, and lastly in the United States court of appeals. The decision in the last-named court was not upon any technical ground, as suggested by appellant herein, but for the reason that there was no equity in the contention of the railway company, and that the evidence wholly failed to justify the charge that an error was committed in the original inspection. (See Elliott *vs.* M., K. & T. R'y Co., 40 U. S. Apps., 61.)

The case upon appeal was remanded to the United States circuit court, and an order was there made expressly dissolving the temporary injunction. The injunction then being removed, plaintiff took judgment in his original suit and collected his money; every step taken by plaintiff and all the expense incurred were essential to the removal of the restraint placed upon him, requiring him to refrain from prosecuting his suit at law. The counsel is in error in saying that only six thousand dollars were involved; the amount
which plaintiff was prevented from collecting, and which was
132 awarded to him as soon as he could proceed with his suit at law, was twenty-four thousand nine hundred and fifty-nine dollars and seventy-three cents and interest.

There can be no doubt that respondent is entitled to sue upon the injunction bond in the State courts, notwithstanding it was given in a proceeding in equity in the United States circuit court. This is well settled in Meyers *vs.* Black, 120 U. S., 206; Mitchell *vs.* Hawley, 79 Cal., 301; Eastern R'y Co. *vs.* Brown, (Ky. 1896) 36 S. W. Rep., 555; Han. & St. J. R'y Co. *vs.* Shepley, 1 M. A., 254; Wash *vs.* Lackland, 8 M. A., 122. Nor is it necessary to a recovery that the damages should have been assessed in the equity suit. The courts of this State conform to that practice because the statute authorizes and requires it. 2 R. S. 1889, sec. 5500 and 5501.

This bond was not given under the statute, and the Federal courts are not controlled by it. In Russell *vs.* Farley, 105 U. S., 433, it is said, on page 446: "But whilst the court may *hear* (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power it is in its discretion to exercise it, or to leave the parties to an action at law; no doubt in many cases the latter course would be the more suitable and convenient one." In High on Injunctions, sec. 1670, (3 ed.) it is said that: "The payment of damages is considered as a penalty for failure to sustain an injunction, and it is held that the order of dissolution necessarily imparts that the damages are to be paid, unless it expressly remits them." Again, sec. 1657 says: "In the absence, therefore, of legislative authority to the contrary, a court of equity will not, on dissolving an injunction, enforce payment of damages in the original cause, but will remit *that* parties aggrieved to their action upon the bond."

133 Our statute giving authority to assess the damages in the court which dissolves the injunction, and at the time thereof, has no application to this case.

It is said, however, that the condition of the bond is to pay the damages "adjudged," and as none had been "adjudged" prior to this suit there is no liability. The Supreme Court of the United States answered that argument most effectually in Meyers *vs.* Block, 120 U. S., *supra*, the court saying: "The condition is to pay 'all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued;' * * * where, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself, otherwise it is useless and vain." There the condition was to pay such damages as should be "recovered," here such as should be "adjudged;" the former was held to mean such as should be recovered in a suit on the bond. In this case the condition must likewise mean such damages as should be adjudged in a suit upon the bond itself. (See, also, High on Injunctions, 3 ed., sec. 1670.)

We deem it unnecessary to discuss the question as to whether attorneys' fees can be collected as damages; all the cases cited hereinbefore sustain that right. In Mitchell *vs.* Hawley, 79 Cal., 301, the court answered an argument similar to that advanced in this case in this manner: "We cannot agree with counsel in the view that in an action brought in a court of this State, on an injunction bond given in a court of the United States, counsel fees can
134 in no instance be recovered as damages, because such damages are not allowed by the Federal courts." The St. Louis court of appeals has decided the same way in two cases; it is not an open question. The testimony was confined expressly to the value of the attorneys' services in securing a dissolution of the injunction; the declaration of law given for the plaintiff shows that the case was tried upon that theory, and the damages were confined within proper bounds. All the steps in the injunction suit were necessary to secure the dissolution, and, until that was done, respondent could not proceed to collect his debt; he could do nothing toward enforcing payment until the restraining order was removed. Hence all the expenses referred to in the testimony and included in the damages assessed herein were properly incurred for that purpose. Hammerslough *vs.* K. C. Blg. Ass'n, 79 Mo., 80; Holloway *vs.* Holloway, 103 Mo., 274. The judgment should be affirmed.

JOHN COSGROVE,
Attorney for Respondent.

135 And thereafter the case was argued orally, was submitted to the court, and having been taken under advisement, the said Kansas City court of appeals on January 2nd, 1899, filed an opinion and rendered judgment in said case in words and figures as follows, to wit:

136 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
M., K. & T. RAILWAY COMPANY, Appellant. } No. 5065.

Opinion.

Appeal from Cooper circuit court.

This is an action on an injunction bond given in a suit in the United States circuit court, western district of Missouri. On a trial by the lower court without the aid of a jury, plaintiff had judgment for $2,000.00, and defendant appealed. The controversy between these litigants arose in the year 1892, when the plaintiff sued the defendant in the circuit court of Cooper county for an
137 alleged balance of about $37,000.00 due on certain tie contracts. On defendant's application that suit was removed into the Federal circuit court at Jefferson City, and there this defendant, as complainant, began a suit in equity against Elliott to enjoin him from the further prosecution of his action at law. The basis of this equity suit seems to have been that Elliott had not furnished the character and quality of ties he claimed, and that the classification by the inspector jointly agreed upon by the parties, was erroneous, fraudulent and unfair to the railroad company. To secure a temporary injunction, the U. S. circuit court required, and the company (then complainant), gave a bond in the penal sum of $20,000.00, said bond reciting that "whereas, the above-bounden principal, the Missouri, Kansas & Texas Railway Company, in a suit in equity instituted by it against the said John S. Elliott in the circuit court of the United States for the western district of Missouri, and which is numbered 2092 in said court, has applied for and obtained a temporary injunction, the nature and purpose of which said temporary injunction is to restrain the prosecution of an action at law in which the said John S. Elliott is plaintiff and The Missouri, Kansas & Texas Railway Company is defendant, now pending in the above-named court and under the number 2082," then follows the condition, that if the said railway company "will abide the decision which may be made in said case number 2092 and upon said injunction, and shall pay all sums
138 of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation will be void, otherwise to remain in full force and effect."

In due season Elliott filed answer in the equity suit, putting in issue the allegations of fraudulent inspection, etc., and prayed that the injunction be dissolved and the bill dismissed. Thereupon the U. S. circuit court referred the issue of law and fact to S. C. Douglas, Esq., with instructions to take testimony and report. Mr. Douglas, as special master in chancery, took evidence in various parts of the country, and subsequently made a lengthy report, the

purport of which was to find all issues for Elliott. To the master's report numerous exceptions were filed by the railway company, some of which were sustained and some overruled. The U. S. circuit court however sustained in a large measure the complaint of the railway company and entered a decree making permanent the temporary injunction and forever enjoining Elliott, from the further prosecution of his action at law. Thereupon Elliott appealed to the U. S. circuit court of appeals, where the cause was heard, the circuit court reversed and the said injunction suit remanded to the lower court with directions to dismiss the bill. The opinion will be found reported in vol. 74 Fed. Rep., p. 767. Thereupon, in accordance with this mandate from the court of appeals, the U. S. circuit court entered its decree in terms dissolving the injunction formerly granted and dismissing the bill.

139 Elliott then, being relieved of the restraint imposed by the injunction, proceeded with his action at law, submitted his case to the U. S. circuit court and had judgment as prayed for in his petition. Following this the case we have here was instituted in the Cooper circuit court with the result before stated. The amount recovered below is made up entirely of attorneys' fees paid or contracted for and plaintiff's other personal expenses paid and incurred in defeating the injunction suit.

I. Defendant's objections to the judgment below may be thus stated: First, that there was no breach of the conditions of the bond in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that defendant "should pay all sums of money damages and costs that shall be adjudged against it" etc., and secondly, it is contended, that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts; that attorneys' fees are not there considered elements of damage in suits on injunction bonds and that therefore our State courts should apply the same rule in suits on bonds given in the Federal courts; and thirdly, it is insisted, that the trial court erroneously allowed as damages attorneys' fees for defending the entire case — that the injunction was merely incidental to the principal case and no attorneys' fees were paid to secure its dissolution.

140 Defendant's first contention is based largely on a line of cases decided by our supreme court, among which is Dorriss *v.* Carter (67 Mo. 544) holding that in a suit on a statutory injunction bond no action for damages can be sustained until such damages have been assessed by the court dissolving the injunction. In our opinion these cases have no application here, since they are based on the provisions of our injunction statute which cannot be used to control equity proceedings in the Federal courts. Under the Missouri statute, the State court is imperatively required, when entering a judgment dissolving an injunction, to proceed in that case to assess defendant's damages. The statute there has prepared a way—has prepared a rule of practice—whereby such damages shall be assessed; and all that these decisions hold is, that such

practice shall be observed when seeking to enforce such statutory bond in our State court. There is no such statute controlling the Federal courts, they are left to follow the general rules of equity procedure, where it is said, "the doctrine is too firmly fixed to admit of controversy, that in the absence of positive legislation a court of equity has no power to afford a remedy upon the bond in the injunction suit, such a power being neither an incident to the general powers of courts of equity, nor consistent with the principles of equity jurisdiction. In the absence, therefore, of legislative authority to the contrary, a court of equity will not, upon dissolving an
141 injunction, enforce payment of damages in the original cause, but will remit the parties aggrieved to their action on the bond."

2 High on Inj., sec. 1657 (3d ed.);
See also 2 Sutherland on Damages, sec. 523 (2nd ed.);
Bein *et al. v.* Heath, 12 How. 168, and other cases cited by above authors.

If then the Federal court had no right or authority when dissolving the injunction, to proceed further and determine defendant's damages, it cannot, with any show of reason, be claimed, that the defendant in the injunction suit should not be allowed to sue on the bond to recover his damages until such damages had been assessed in the original case. To so hold would involve an absurdity. While Justice Bradley, in Russell *v.* Farley (105 U. S. 433), has, in a dictum, expressed doubts as to the correctness of the above rule, which denies jurisdiction of a court of equity to hear and determine damages in the original case, yet the learned judge concludes in this language: "But whilst the court may have (we do not now decide that it has) the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one." Even then though the U. S. circuit court in this original equity suit may have had such incidental power
142 and jurisdiction to assess Elliott's damages, it did not do so, but left defendant there (plaintiff here) to pursue his remedy on the bond. And it would seem then that this plaintiff ought to — permitted now to prosecute this action. It is true that the bond is conditioned for the payment of such "damages and costs that shall be adjudged against" the complainant in the injunction suit. We do not think, however, that the word adjudged should be so narrowed as to include only such damages as should be assessed in the original case or that it was ever so intended; it was meant to include all damages, whether assessed by the equity court or subsequently in an action at law on the bond. In Myers *v.* Block (120 U. S., 206), the condition was, that the plaintiffs in the injunction case would pay all damages that the defendant might "recover," and the court said: "When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself; other-

wise it is senseless and vain." The word recover used in the bond just referred to means the same as adjudged in the bond in this suit.

In view then of the foregoing consideration, we have no hesitancy in deciding the first point against the defendant.

II. The second position of defendant's able counsel is also untenable.

His contention is that plaintiff is not entitled, in a suit on
143 this bond, to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded, as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction bond. But it is claimed that because this bond was made in a suit at the time pending in the Federal court, no attorneys' fees should be allowed because contrary to the holding of such courts in like cases.

Reason and authority, we think, stand opposed to this contention:—

2 Sutherland on Damages, sec. 525 (2d ed.).
H. & St. J. R. R. Co. *v.* Shepley, 1 M. A., 254.
Walsh *v.* Lackland, 8 M. A., 122.
Mitchell *v.* Hawley, 79 Cal., 301.
Aiken *v.* Leathers, 40 La. An., 23.

As said by the supreme court of California in case above cited: "Bondsmen, in such a case, cannot be held to have contracted with the understanding that a suit would be brought upon the bond (if at all) in a Federal court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California (which was probably the fact) an action on the bond could probably not be maintained in a Federal court at all."

144 So, in the case at bar, it cannot be said that this defendant and its sureties, when they executed the bond in the injunction suit, contracted with reference to the particular ruling of the Federal courts as to allowing attorneys' fees as damages, for, as already stated, the defendant in the injunction suit might, on a dissolution thereof, proceed against them in the State courts where a different rule prevails and where counsel fees are regarded as a proper element of damages to be assessed on the bond. Judge Bakewell, speaking for the St. Louis court of appeals, in R. R. Co. *v.* Shepley, *supra*, uses this language: "A bond of this kind is to be interpreted by the rules that govern the interpretation of any other contract. If the obligor, when executing it, knew that under the ruling of the Supreme Court of the United States he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the supreme court of Missouri upon the same obligation, in a similar proceeding, he would be held for counsel fees in case of failure to maintain his injunction."

III. Neither have we any doubt as to the propriety of the circuit

court's action in treating the attorneys' fees paid, or contracted for, as an element of damages in a suit on the bond in question. Plaintiff's liability for these counsel fees *were* manifestly incurred in the sole effort to relieve himself of the injunction order restraining him from prosecuting his action at law for the recovery of the large sum of money owing on the tie contracts. After the institution
145 of this action on the contract the defendant railway company presented its complaint to the equity side of the United States court alleging the fraudulent inspection and classification of the ties and prayed said court to enjoin this plaintiff from at all prosecuting his law action. On the face of the bill the court felt warranted to, and did grant a temporary injunction restraining the defendant there (plaintiff here) from prosecuting the suit at law, conditioned, however, that the complainant make the bond in question, which it did. In that suit this plaintiff filed his answer putting in issue the fraud alleged and prayed the court to dissolve the injunction. The case was heard first by the master in chancery, who reported the facts found and the law as he understood it, advising a dissolution of the injunction; but the Federal circuit court where this report and finding was reviewed sustained exceptions and decreed that the injunction be made perpetual. Thereupon this plaintiff (defendant in the injunction suit) appealed to the U. S. circuit court of appeals where, as already stated, the judgment of the lower court was reversed and the cause remanded with directions to dismiss the case. This mandate was complied with and the injunction was finally dissolved by a decree in the court where the suit originated. This plaintiff then, having defeated the injunction and relieved himself of the restraint, proceeded with his action at law, recovered judgment and collected his money.

The record here shows that the trial court, in fixing plain-
146 tiff's damages on the injunction bond, allowed only such counsel fees as were paid, or liability therefor incurred, in defense of the injunction proceeding, and this clearly plaintiff was entitled to. Liability for such fees was incurred in procuring a dissolution of the injunction, nothing else. Injunction was the sole remedy sought by the equity suit, and this being so, the authorities are uniform that the attorneys' fees for the entire case are recoverable on the injunction bond; and this too whether or not the case was tried on a formal motion to dissolve or on an answer putting in issue the allegations of the bill.

Brownlee *v.* Fenwick, 103 Mo. 420;

Banking Co. *v.* Monarch Co., 68 M. A. 603; and authorities there cited.

The reasonableness of the fees and expenses paid and incurred by plaintiff in securing a dissolution of the injunction, was submitted to the trial court, under proper and abundant evidence, and its finding thereon is conclusive on us.

The judges all concurring the judgment will be affirmed.

T. A. GILL.

147 Kansas City Court of Appeals, October Term, 1898.

J. S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS AND TEXAS R'Y Co., Appellant. } # 5065.

Appeal from Cooper circuit court.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said circuit court of Cooper county rendered, be in all things affirmed, and stand in full force and effect. It is further considered and adjudged by the court, that the said respondent recover against the said appellant costs and charges herein expended, and have therefor execution. (Opinion filed.)

STATE OF MISSOURI, *sct:*

I, L. F. McCoy, clerk of the Kansas City court of appeals, certify that the foregoing is a full, true and complete transcript of the judgment of said Kansas City court of appeals, entered of record at the October term thereof, 1898, and on 2nd day of January, 1899, in the above-entitled cause.

Given under my hand and the seal of said court, at the city of Kansas, this June 28th, 1900.

[Seal Kansas City Court of Appeals.]

L. F. McCOY, *Clerk.*
S. W. STRODY, *D. C.*

148 And afterwards on January 2nd, 1899, the said appellant filed a motion for rehearing and to transfer said case to the supreme court of the State of Missouri in words and figures as follows, to wit:

149 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. 5065.

Appeal from Cooper circuit court.

Motion for Rehearing and to Transfer to Supreme Court and Suggestions in Support of Same.

Geo. P. B. Jackson, for appellant.

150 In the Kansas City Court of Appeals, October Term, 1898.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. 5065.

Motion for Rehearing.

Now comes the above-named appellant and moves the court to grant a rehearing in the above-entitled cause for the following reasons:

I.

Because the court has wholly misconceived the nature and purpose of the suit in the United States circuit court in which
151 the bond here sued upon was given, because in the opinion of this court it is said that said suit was "a suit in equity against Elliott to enjoin him from the farther prosecution of his action at law;" and again: "Injunction was the sole remedy sought by the equity suit," whereas the bill of complaint in said suit and the proceedings therein show that the institution of said suit in equity and the asking of any injunction whatever therein arose out of the peculiar rules of practice in the Federal courts, which require the institution of a separate suit in equity to establish the equitable rights which the complainant in that equity suit relied upon as a defense to an action at law already brought against it by the defendant in the equity suit, and which defence would have been entirely available in the action at law if it had been pending in the State court, and that the purpose of said equity suit was primarily and wholly to set aside certain inspections of ties relied upon by the plaintiff in the action at law, and for an accounting, and that the injunction of the prosecution of the action at law pending the determination of the rights of the parties in the equity suit was a mere incident to such suit, and therefore the rights of the parties in this case ought to be determined by the decisions of this court and of the supreme court of the State relating to injunctions as mere incidents to suits for other relief.

II.

Because the court, in rendering the decision which it has
152 in this case has wholly ignored the decisions in the cases of Anderson *v.* Anderson, 55 M. A. 268; Banking Company *v.* Monarch Co., 68 M. A. 603, and Brown *v.* Baldwin, 121 Mo. 136, which were expressly cited, and which hold that injunctions, which were more distinguished in their purpose and more especially the object of the suits there brought than in the case at bar, were only to be regarded as incidents to the other more particular relief sought, and because the court has also wholly ignored those cases which hold that attorneys' fees could not be allowed as damages under the circumstances of the present case.

III.

Because the court has decided the case in disregard of and contrary to the ruling of the supreme court in the case of Brown *v.* Baldwin, 121 Mo. 136, and is also in disregard of and contrary to the ruling of the supreme court in the cases of Corder *v.* Martin, 17 Mo. 41, and Dorriss *v.* Carter, 67 Mo. 544, which said last-mentioned decisions of the supreme court are the last previous rulings of that court upon the questions of law and equity involved in this case, and under the constitution of the State said rulings and decisions of the supreme court are the controlling authority in this court, and the decision of the court as it now stands is contrary to and in violation of the constitution of the State of Missouri because it has ignored and does not follow the said last previous decisions of the supreme court of the State.

153 IV.

Because the court has wholly ignored the second point made in the appellant's brief and the numerous authorities cited thereunder to the effect that the law in force at the time and place the bond was made is to be considered as incorporated in it and as a part of the contract; that the bond is a part of the record in the case in the court in which it is given, and that where there is no express statutory provision controlling the giving of bonds in such cases the rules of court have the effect of laws and are to be considered as incorporated in and as part of the contract.

V.

Because the court has wholly misconceived the scope and the effect of the case of Bein *v.* Heath, 12 How. 168, decided by the Supreme Court of the United States and also of Dorris *v.* Carter, 67 Mo., 544, decided by the supreme court of the State of Missouri, and the other cases cited in connection therewith.

VI.

Because the court ignored the further point made in the brief to the effect that attorneys' fees for services on appeal cannot be allowed

and also ignored the case of Teasdale *v.* Jones, 40 M. A. 243, decided by this court to the above effect, whereas the evidence in the
154 case conclusively shows that a large portion of the services claimed by the attorneys were rendered in the United States court of appeals.

VII.

Because the court wholly misconceived the nature of the undertaking and obligation of the bond sued upon, and erroneously held that the nature and extent of the obligation entered into would depend upon the court in which a suit might ultimately be brought to enforce the bond, and in effect declared the law to be that the same contract would impose one liability and obligation and give one right of recovery if sued upon in a State court, and would impose a different liability and obligation, and give a different right of recovery if sued upon in a Federal court.

VIII.

And in disposing of this branch of the case the court wholly ignored the fact that the same involves a Federal question, for the reason that the controversy in this suit arises under the authority of the United States, and under the laws of the United States governing and applicable to United States courts.

And if the court shall refuse to grant a rehearing in this case the appellant then moves the court to transfer the case to the supreme court of the State of Missouri for the reason that a Federal question is involved, and because the subject of the controversy of
155 this suit arises under the authority of the United States and under the exercise of such authority, and under the laws of the United States governing and controlling the courts of the United States and the proceedings therein.

And the appellant also moves this court to transfer this case to the supreme court of the State of Missouri because the opinion as already filed in this case, and the judgment and decision of the court herein, are in conflict with the constitution of the State of Missouri, because in rendering said opinion and in making said decision this court has ignored and gone contrary to the last previous decisions of the supreme court of the State of Missouri upon the questions of law and equity involved in this case, which said previous rulings of the supreme court are made the controlling authority in this court by sec. VI of the amendment of 1884 to the constitution of the State of Missouri.

And because in and by means of the opinion, decision and judgment of this court made and rendered in disposing of this case, this court has denied the appellant the equal protection of the law, and has deprived it of its property without due process of law, in violation of section 1 of article XIV of the amendments to the Constitution of the United States, and in violation of section 30 of article II of the constitution of the State of Missouri, as well as in violation of

section 6 of the amendment of 1884, to the constitution of the State of Missouri.

GEO. P. B. JACKSON,
Attorney for Appellant.

156 *Suggestions in Support of Motion for Rehearing and Motion to Transfer to Supreme Court.*

I.

I cannot conceive that this court could have filed the opinion it did in this case if it had had a correct understanding of the injunction in the Federal court. I attempted in the statement and argument heretofore filed to give a correct idea of that proceeding, but the court in its opinion seems, regardless of the pleadings in that case, and the circumstances under which it was brought, to have adopted the unsupported statement of respondent's counsel, because the court in its opinion adopts the language of the respondent's statement to the effect that the suit in which the bond was given was commenced to enjoin Elliott from the farther prosecution of his action at law, and also that "injunction was the sole remedy sought by the equity suit." And again that the "counsel fees were manifestly incurred in the sole effort to relieve himself from the injunction order restraining him from prosecuting his action at law for the recovery of the large sum of money owing on the tie contracts." The court thus considers the matter, just as the respondent urged in the argument of the case, that it was necessary to finally defeat the complainant in that equity case before the defendant there,
157 the plaintiff here, could recover any part of the money claimed by him. The record in this case at page 49 shows that the record in the other case was considered in evidence, but it was not considered necessary to incumber this record with the voluminous record of the other case, because the respondent's attorney, Mr. Cosgrove, in his testimony stated all the facts necessary to establish the contention of the appellant, notwithstanding the averment in his petition and the assertion in his argument that the sole purpose of the equity suit in the United States court was to obtain an injunction to restrain the prosecution of the action at law. If the court will but read the testimony of Mr. Cosgrove, instead of his assertions by way of argument, it will find that there is no basis in fact for the assumption relied upon as the ground of the opinion. Neither the injunction nor anything else stood in the way of the plaintiff's recovering the bulk of the money claimed by him. That was admitted. The defendant in this case in that controversy in the Federal court insisted that it ought not to be required to pay as much as was demanded, and, as Mr. Cosgrove stated in his testimony, the real controversy was over about $6,000 instead of $37,000, as assumed by this court. When the Federal court come to render its decree in the equity case it rendered a judgment for Mr. Elliott for all that he claimed except about $6,000. The proof was that this amount was tendered to him by the railroad company uncondition-

ally, and he refused to receive it, so that at the most that can be said
the injunction really tied up the amount that was in dis-
158 pute, and when the case was reversed by the United States
court of appeals it was not at all necessary for this plaintiff as
defendant in that equity suit to pursue the course he did. He was
entitled to, and if he had pursued the course open to him he could,
have had a decree rendered at that time for the entire amount. I
do not say this to urge that there was no feature of restraint in the
case by reason of the injunction, but to show the utter misconception
of the case when it is asserted that the sole object of it was to enjoin
something. When we see that four or five times the amount really
in controversy was sought by and was adjudged in favor of Mr.
Elliott, notwithstanding the injunction that was granted and when
the way was open in that same suit to obtain a decree for the entire
amount, after the reversal in the court of appeals, it seems idle to
talk about the injunction being even the chief, not to say the sole
object of the suit.

But again we have only to look at the circumstances and to view
the matter as it arose in the Federal court. First, we find in that
court the action transferred from the State court. The record shows
that originally that was a suit to enforce a contractor's lien, which
under the practice of Federal courts was necessary to be disposed of
as an equity case. If it had proceeded in the condition in which it
was when this defendant secured its removal to the Federal court
the equitable defenses would have been open to it by its cross-bill in
the same suit, but when the Federal court ruled that that was a case
upon the equity side of the court this plaintiff filed an amended
159 petition, abandoning the lien claimed by him, and asking
simply for a money judgment, thereby converting the action
into one at law. Mr. Elliott and his attorneys having by that
amendment cut off the opportunity to make the equitable defense in
the same suit, this defendant was compelled under the practice and
ruling of that court, as stated by Mr. Cosgrove in his testimony in
this case, to commence the suit in equity for the purpose of estab-
lishing the equitable defense which it relied upon. Now that was
not to forever enjoin the prosecution of Elliott's action at law as the
sole purpose, nor even as the principal object of the suit, but it was
to set aside and vacate the reports of inspections of ties made by the
inspector because of the alleged fraud and mistake, which could not
be pleaded in the action at law, and because it could not be so
pleaded, and in order to render the defense available and of sub-
stance to this defendant, it prayed, first that the court as a court of
equity would entertain its bill of complaint, and adjudicate upon
the merits of its equitable defense, and while the court was investi-
gating the merits of that defence, and in order that the plaintiff
might not obtain an unconscionable advantage by securing a judg-
ment in the action at law before the rights of the parties could be
adjudicated in the equity suit, there was the additional prayer
as an incident to the main purpose that the prosecution of the action
at law be enjoined. The injunction was not absolutely necessary,
but was simply in conformity with the usual practice in the Fed-

eral court. The equity suit brought by this defendant in the
160 Federal court would have been entirely sufficient if it had simply prayed for that which was the principal purpose, namely, the annulling and setting aside of the reports of the tie inspector, and an accounting of the correct amount due to Mr. Elliott, provided in the meantime a conclusive judgment was not rendered against it in the action at law. That might have been controlled by that court simply refusing to try the law case or by its continuing it without any injunction. The court, however, conformed to the usual practice, and required a bond as a part of the proceeding of that court to protect this plaintiff (defendant there) against any damages that he might sustain in that court. This is undoubtedly a wise practice, but the statement of what might have been done shows the true relation of the injunction to the whole controversy. It was not the chief object. There was no prayer simply that the defendant in the equity suit be enjoined from doing something without an effort to secure other relief, but the prayer for injunction and the granting of the injunction were mere incidents to the cause of action stated in the bill of complaint and to the principal relief that was sought by it.

This court in the opinion speaks of the injunction as though that was the thing paramount in everybody's mind as that equity suit progressed from time to time. It is true that in the formal conclusion of the answer the defendant there (Elliott) did ask that the temporary injunction against him be dissolved, but if the court will read that answer it will find that there is not a single refer-
161 ence, besides that, to any circumstances or conditions peculiar to an injunction, and that there are no averments of any facts by way of defense to the plaintiff's bill except such as were designed to defeat the complainant's effort to vacate and annul the reports of the inspector. Of course whenever Elliott succeeded in defeating the effort for that relief the injunction fell with it, but it fell as a mere incident and nothing else. I submit for the inspection of the court a copy of the printed record of the case in the United States court of appeals and also copies of the briefs of both parties in that court. The court will find the opinion of the United States court of appeals in the 74 Fed. 707, and I call the attention of the court to the fact that there is not in any place in the proceeding before the master, nor in his report, nor in the exceptions thereto, nor in the opinion filed by Judge Philips in the circuit court, nor in the brief or argument of counsel upon either side in the court of appeals, nor in the opinion of the court of appeals, a single reference to the subject or matter of injunction. The fact that there had been a temporary injunction granted was wholly ignored. It was a matter of insignificance. It was a matter of no importance in the controversy which was being tried between the parties. The complainant (defendant here) was examining witnesses and proving that the number of ties of the different classes was erroneously reported by the inspector; that the difference in the purchase price by reason of the mistake in inspection amounted to

about $6,000. The defendant in that case (plaintiff here) was
162 standing upon the proposition that the report of the inspector as previously made was conclusive and could not be set aside, and that he had paid for the ties before the reinspection was made. This was the labor towards which the services of attorneys upon both sides were directed, and through all this proceeding and in all the services no effort was made to secure a dissolution of the injunction, and no mention of the injunction was made until the case came back to the circuit court after the reversal in the court of appeals, when in entering up the decree a usual form was followed, and the order was entered that the bill be dismissed and the injunction theretofore granted should be dissolved. If there ever was a case where the injunction could be and should be regarded as incident to some other which was the chief or main purpose of the suit this is one.

In the case of Anderson *v.* Anderson, 55 M. A. 268, this court, speaking through his honor Judge Gill, decided that the injunction there was only an incident, and therefore no attorneys' fees could be allowed as damages upon the injunction bond. That was a proceeding by a divorced wife to secure alimony out of the property of her husband, and in her application she averred that the defendant was a spendthrift and of reckless and dissipated habits, and prayed for an order enjoining him from disposing of or incumbering his property until her motion was finally heard, etc. A temporary injunction to that effect was granted. Subsequently the court dis-
163 solved the injunction and dismissed the plaintiff's petition on the ground that it had no jurisdiction over the person of the defendant and assessed damages on the injunction bond for the amount of the attorneys' fees incurred by the defendant. The court held there that the disposition of the main question litigated *ipso facto* relieved the defendant of the injunction, and that being the case attorneys' fees were not recoverable as damages. In that case the injunction was in no manner necessary by reason of any rule of practice prevailing in the court where the proceeding for alimony was instituted. The plaintiff in that case was not required to ask for an injunction in order that she might have an allowance for alimony. Outside of any rule of law or any rule of practice, a fact existed, namely, the danger of her husband squandering his money, which was deemed a sufficient ground for enjoining him from disposing of his property. Certainly the injunction in that case stands out more distinct and independent from the other controversy in the case than does the one in the case at bar. There was less of the character of a mere incident in the injunction in that suit for alimony than in the injunction granted by the Federal court because of the necessity of the party resorting to the equity side of the court to establish its defense, and yet in the Anderson case this court decided that the injunction was a mere incident; that it fell with the decision of the main question and no attorneys' fees could be allowed.

In Banking Co. *v.* Monarch Co., 68 M. A., 603, this court again speaking through his honor Judge Gill, ruled to the same
164 effect concerning an injunction granted under the following circumstances: An attachment suit having been commenced,

a suit in equity was brought in aid of it, in which it was alleged that a certain chattel mortgage was fraudulent and void as to certain creditors, and that the defendants in that suit were about to organize a corporation to carry on a certain business and to transfer to the corporation the good will and certain trade-marks and whisky brands. The prayer for relief was that the court declare a certain chattel mortgage of personal property null and void and no prayer for an injunction seems to have been made by the original petition, but along with it the plaintiff filed a motion for temporary injunction asking the court to enjoin and restrain the defendants from taking and using the firm name and the trade-marks until the final hearing of the cause. To this extent a temporary injunction was granted and the bond given. Subsequently the court sustained demurrers to the petition and dismissed the suit, and thereupon assessed damages on the injunction bond for the amount of $250 attorneys' fees. This court reversed the judgment because the services of the attorneys "consisted in taking depositions as to the good faith of the mortgages and preparing and arguing the demurrers to the petition. There was nothing done looking to the dissolution of the injunction except as it would incidentally follow from a defeat of the main case." Again I say that the injunction which the court there adjudged to be a mere incident stood out more promi-
165 nently as a distinct and independent part of the proceeding than does the injunction in the case at bar. It was not at all necessary to the relief sought by having a certain chattel mortgage declared fraudulent and void, that the plaintiff in that suit should have secured an injunction against the use of the good will and trade-mark of the firm, which was not even a subject of sale upon execution. The subject-matter of the injunction seems to have been distinct in that case from the main subject of the controversy, but the court held it a mere incident of the main case, and because it was such it fell with the decision of that case and no attorneys' fees could be recovered as damages.

In the case of Brown *v.* Baldwin, 121 Mo. 126, there was an assessment of damages upon an injunction bond which the court held to be a mere incident to the main cause of action. In that case certain parties having been defeated as defendants in an ejectment suit, commenced their action under the statute to recover the value of their improvements, and gave a bond and obtained an injunction to stay execution pending their ascertainment. The court decided adversely to them upon this claim for improvements and dissolved the injunction, and thereupon there was an assessment of damages upon the injunction bond, and the trial court refused to allow any damages on account of attorneys' fees. From this ruling an appeal was taken to the supreme court, which, in disposing of the matter, used the following language at page 136 of the report:

166 "It is insisted that the court erred in not allowing Mrs. Baldwin her attorneys' fees for defending this whole case for improvements, instead of restricting her to reasonable fees in and about the injunction proper. In disposing of this question, the object and purpose of the injunction must be kept in view. The in-

junction was obtained under section 4647, Revised Statutes, 1889, which provides that 'an injunction may be granted to stay the plaintiff from taking possession of the land until the value of the improvements is ascertained, or the further order of the court.' It is, we think, apparent, that the injunction in this case is merely ancillary to the main cause of action."

When we apply the spirit and the reasoning of that language of the supreme court of the State to the case at bar we have a conclusive ruling by that court to the effect that in the case at bar the injunction must be regarded as a mere incident of the proceeding in which it was granted. The injunction in the case of Brown *v.* Baldwin was given in accordance with the provision of the statute bearing upon the general subject of the right of an unsuccessful defendant in an ejectment suit to recover for the improvements which he had put upon the land. It was but an incident to his effort to recover for such improvements. When the other party defeated such recovery, the injunction fell with it. So in the case at bar the injunction was given in pursuance of a provision of the laws of the United States, and of the rules of the United States courts made in
167 pursuance of such laws, which provisions relate to the general subject of practice in the Federal courts and in the assertion and the establishment of equitable rights and defenses in that court. The granting of the injunction under such circumstances was a mere incident to the other relief, that is the cancellation and annulling of certain instruments alleged to be the result of fraud and mistake, and the taking of an account between the parties. When the defendant in that proceeding succeeded in defeating the effort of the plaintiff to secure that relief the injunction necessarily fell with it. Let us suppose, if you please, that not a word had been said about the injunction in the order which was entered dismissing the bill in the Federal court. Suppose that the order made by Judge Adams, which appears on page 68 of the printed record in this case, had simply recited the filing of the mandate of the court of appeals, and had then concluded that "it is ordered and adjudged that the complainant's bill is dismissed," which is all that the court of appeals directed to be done. Would any one contend for a moment that Mr. Elliott was still restrained from proceeding in his action at law? Is it not a fact that he was as fully discharged from any restraining effect of the injunction when the court of appeals reversed the decree and ordered the bill dismissed without mentioning the injunction, as he ever was? If the circuit court had entered its order dismissing the bill in the language of the court of appeals, without any reference whatever in terms to the injunction, could any one have contended that Mr. Elliott
168 was still tied up so that he could not prosecute his action at law? Unquestionably not. It would have been asserted, and properly asserted, that the dismissal of the bill disposed of the main controversy, and that the injunction fell as a mere incident. Or suppose again that the practice of the State court had prevailed, and that it had not been necessary to present the defense by a separate proceeding in equity. That is that the same matters set up in

the complainant's bill in the equity suit had been pleaded in the answer, as they might be in the State practice. The same issues would have been presented. The same evidence would have been necessary. The same law would have been applicable. The same efforts and services of the attorneys would have been required, and consequently Mr. Elliott would have incurred the same liability for attorneys' fees. No question of injunction would have been presented in that case, and how then can it be logically said, when the same attorneys' fees would have been incurred whether there was any injunction or not, and when the order of injunction simply resulted from a different method of reaching the same end according to the different rules of practice in the different jurisdictions—how, I ask, can it be said that the injunction was the sole purpose of the suit, or even the main object of the suit, or that it was anything else than a mere incident of that purpose which would have been the chief purpose under any form of practice? How can it
169 be said that the attorneys' services sued for were entirely necessary because of the injunction in the one jurisdiction when the same services would have been necessary in the other jurisdiction where there would have been no injunction?

I submit on this branch of the case that the court has fallen into manifest error in the view that it took of the proceeding, and that in deciding the case it not only disregarded the decisions of this court in the cases in the 55th and 68th M. A. above referred to, but that it went directly contrary to the ruling of the supreme court in Brown *v.* Baldwin, and for this reason alone the rehearing should be granted.

II.

It is not my purpose to discuss here each separate point mentioned in the motion for rehearing, but it is proper that I should call attention to what seems to me to be a clear misconception of the points made and the authorities cited in this case.

The court in the opinion states the first objection of the defendant or appellant to the judgment of the court below as follows:—

"That there was no breach of the conditions of the bond in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that the defendant should pay all sums of money, damages and costs that should be adjudged against it," etc.

170 The court then remarks:—

"Defendant's first contention is based largely on a line of cases decided by our supreme court, among which is Dorriss *v.* Carter, 67 Mo. 544, holding that in a suit on a statutory injunction bond no action for damages can be sustained until such damages have been assessed by the court dissolving the injunction. In our opinion these cases have no application here, since they are based on the provisions of our injunction statute, which cannot be used to control equity proceedings in Federal courts."

Certainly in view of the conclusion reached by the court in this case it would be unjust to the court to say that in the case of Dor-

riss *v.* Carter and similar cases the bond was to be regarded as statutory because it was given in a court which was subject to the control of the State statute. If the court meant to say that it concedes what the appellant claims on the other branch of the case, namely, that the rule of liability of the Federal courts is to govern in this case, and since the court has refused to hold to that view, it must follow that the bonds spoken of in the cases cited from the supreme court were statutory bonds, not because of the proceeding in which they were given, but because of the form in which they were drawn, and if the cases are examined with more care it will be found that whenever the bonds were designated as statutory bonds it was because they were conditioned in the language prescribed by
171 the statute, and the effect of those decisions will farther be found to be simply a judicial construction of the language used in the conditions of the bond, and not for the reason stated by this court in the opinion, that "under the Missouri statute the State court is imperatively required when entering a judgment dissolving an injunction to proceed in that case to assess defendant's damages." Let it be conceded that the statute does so require, yet that was not the reason given by the supreme court for the construction that it put upon the language of the bonds. It will be found that in the case of Dorriss *v.* Carter, above mentioned, the conclusion of the court was fully reached before any mention was made of that section of the statute providing for the assessment of damages. The only section referred to up to that time was the one which required a bond to be given and stated the condition which should be incorporated in it to the effect that the plaintiff in the injunction suit would "abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved." Now notice the reasoning of the supreme court. Without any reference to any other provision controlling the practice in the State court in injunction cases, the court proceeded at once to consider and determine what was the meaning of the language used in that condition, and it was said: "There can be no breach of the bond until a failure or a refusal to pay whatever sums of money shall have been adjudged
172 against the plaintiff. While the bond is required to be for a sum sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by the injunction, yet the condition of the bond restricts this general language to a liability on the part of the sureties that may be adjudged against the plaintiff."

Most clearly that conclusion, whether sound or not, does not rest upon any other provision of the statute. It was not any provision of the statute but "the condition of the bond," which the court held restricted the liability.

The court in order to fortify its conclusion, does say farther on in the opinion: "This view is strengthened by sec. 14, which requires the court on the dissolution of the injunction to enter a judgment against the obligors in the bond according to the circumstances of the case."

This last sentence is the only language that can be found in any of the opinions upon which this court could base the statement made in the opinion in this case, and I submit that when the opinion in the Dorriss case is read there is no room for any other conclusion than that the court in construing the meaning of the words "that may be adjudged if the injunction is dissolved" determined their meaning from the language itself and not by force of any provision in the statute as to what should take place in an injunction suit at any stage. They simply decided that the condition of the bond was for the payment of something that had previously been
173 adjudged, and that unless there had been a failure to pay something previously adjudged there was no breach of a bond drawn in that form. The court has evidently fallen into a mistake in interpreting these decisions by confusing another point that has been decided in some of the cases to the effect that the motion to assess the damages must be filed at the same term at which the injunction may be dissolved. That conclusion was reached in consequence of the provisions of the statute regulating the practice in such cases, but this court has undertaken to apply the reasons given in other decisions for the conclusion that the motion must be filed at that term, as the reason for the construction which was put upon the language in these bonds. That I submit is not a logical application of the authority of those decisions. I have already shown that the reasoning in the Dorriss case was contrary to the assumption of this court in the case at bar, and I confidently assert that none of the other cases referred to will furnish any more warrant for that view of the matter. This, it seems to me, is made plain by the decision of the supreme court in Hoffelmann *v.* Franke, 96 Mo. 543. In that case the court said that it seemed that the point had never been ruled upon in the supreme court whether the assessment of the damages must occur, at the same term at which the injunction was dissolved or not, and then cited Loehner *v.* Hill, 19 M. A. 141, thus adopting that and similar cases as authority upon the question as to when damages should be assessed, but leaving unnoticed the true construction of the bond. That the two are not the same question, as seems to be assumed by this
174 court, or that the one is not the equivalent of the other, must be conceded, because the court said in the Hoffelman case that the question as to when the assessment should take place had never been determined by that court, whereas we have just seen that in the Dorriss case in the 67 Mo., the court had expressly determined what was the true meaning of the language used in the bond.

Then again in Corder *v.* Martin, 17 Mo. 41, the question of the construction of the language used in the bond was before the supreme court and was passed upon. There the condition of the bond was the same, namely, that the plaintiff should "pay all sums of money, damages and costs that should be adjudged against him if the injunction should be dissolved."

The court there said:—

"The injunction was dissolved and the bill dismissed and Lane

was compelled to pay the costs in the chancery suit. The breaches of the bond stated in the petition are that Lane did not pay the amount of the judgment at law, and that he has not paid to the plaintiff the costs in the chancery suit. The answer denied the liability of the defendants for either of the breaches and was equivalent to a demurrer. The parties proceeded to a trial and a verdict was rendered for the defendant, the court refusing to decide that the defendants were liable.

"It is clear that within the terms of the condition of this bond the amount of the judgment at law was not adjudged against
175 Lane upon a dissolution of the injunction, and therefore the sureties were not bound for its payment."

The judgment of the lower court was affirmed. In this case it will be observed that there is not a single reference to any statutory provision whatever. It cannot be claimed that in that case the supreme court reached the conclusion which it did because of anything required by the statute, as asserted by this court in the opinion now under consideration, but on the contrary construed and determined the meaning of that language simply from the words themselves. These cases of the supreme court will be noticed further in connection with the point that the decision of this court is contrary to the latest rulings of the supreme court.

It is not a valid argument to urge, as does this opinion, that since the Federal court had no authority to assess damages upon the dissolution of the injunction, as is the practice in the State court, therefore the construction of the language used in the bond must be changed. In the first place, it must be conceded that the form of this bond was not such as might have been required in the Federal court, and if the defendant in the equity suit, the plaintiff here, had insisted upon it he undoubtedly could have had a bond given in different form, but it was a matter that escaped the attention of every one. But because a bond might be given which is invalid does not justify the court in diregarding all previous decisions and in putting a construction upon language at vari-
176 ance with that which it has always received before.

Neither is it correct to say that the Federal court had no authority to adjudge any damages. While its true that heretofore damages would not be assessed upon the equity side of the court, and while the practice is not encouraged now, yet there was always authority in the same court to cause the damages to be assessed upon the law side of the court, if the circumstances warranted it. The difficulty was not in the want of power in the court, but in the obligation assumed by the makers of the bond. And this brings us to a consideration of the view which this court has taken of the decision of the Supreme Court of the United States in Bein *v.* Heath, 12 How. 168. While the case may be regarded as an authority upon the proposition to which the court cites it in the opinion, yet it means far more than that, and the real point in the case and the real significance of it was wholly overlooked and disregarded by this court. The real effect of that decision upon this case is twofold, one to be noticed hereafter in connection with

the Federal question involved, and the other as to whether or not an action can be maintained upon a bond before or without a breach of the condition thereof. This court says in its opinion in this case that to hold that this plaintiff could not recover upon the bond sued upon because no damages had previously been adjudged in his favor "would involve an absurdity." If the proposition were original with the defendant's counsel I might have thought that probably this denunciation was a merited rebuke for some temerity in
177 asserting what seemed to me a self-evident proposition, but it is not against either the defendant or its attorney that this language of the court operates. This must apply to the opinion of Chief Justice Taney, concurred in by the other justices of the Supreme Court of the United States as it was composed at that time, and with all respect to this court, I don't think it has been customary to regard the enunciations of that tribunal as absurdities. That court decided in that case that the "contingency on which they (the parties to the bond) agreed to pay has not therefore happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it. It would be against a well-established rule of the chancery court to extend the liability of the surety by any equitable construction beyond the terms of this contract. And in a proceeding upon the bond the liability of the principal obligor would not be extended beyond that of the surety."

The court then held that there could be no recovery upon the bond. And what, I ask, is there so absurd in that position? Do we not every day meet with cases in which the courts hold that contracts will not be enforced, and that recoveries cannot be had because of some defect in the contract itself,—because of some stipulation which nullifies its entire effect. If it is right to decide in case after case that there can be no recovery because of some inconsistent, indefinite or uncertain stipulation in the contract, or because of some positive stipulation which destroys the right of recovery on a contract, why is it absurd to say that this con-
178 tract should be dealt with in the same way, especially when to say so is to decide in harmony with the well-established rule of law that there can be no recovery upon a bond until there is a breach of its condition.

III.

Several other points in the motion which I desire to discuss may be considered together. The court has overlooked the fact that this case involves a Federal question, and at the same time has wholly disregarded the law to the effect that the rules governing the Federal courts whether they be laws of Congress or rules of court promulgated in pursuance of such laws entered into and became a part of the contract evidenced by the bond sued on. I do not overlook what has been said in the second paragraph of the opinion, and I note that the court remarks: "But it is claimed that because this bond was made in a suit at the time pending in the Federal court no attorneys' fees should be allowed because contrary to the holding of such courts in like cases." In a way that refers to the

proposition involved, but it does not fully and fairly state it. Just as the cases subsequently decided by the court wholly omit the fundamental principle controlling such cases, namely, that the law of the jurisdiction in force at the time a contract is made is to be read into it, and construed as a part of it, and that the liability assumed is measured by such law as a part of the contract. We concede that those matters which pertain to the remedy solely
179 will be governed by the law of the forum where the suit is brought, but unless this court is prepared to say that the measure of liability assumed by an undertaking set forth in a written contract is simply an incident to the remedy upon that contract, then clearly the conclusion of the opinion is wrong. This is the vice of the several cases cited in the opinion, and which I attempted to show in the original brief rest upon the authority of cases that did not touch the question. But passing from that I insist that it was proper to give consideration to other cases which have been cited clearly establishing the proposition that the law of the Federal court is controlling in this case. To the authorities cited in the brief should be added 2 High on Inj., sec. 1620, and Beim *v.* Heath, 12 How., 168. With all respect, I submit that the opinion is not consistent in its different parts. In the first paragraph, the court when considering the effect of the case of Dorriss *v.* Carter *et al.*, refers to the provisions of the State statute governing injunction suits, and says:—

"In our opinion these cases have no application here since they are based on the provisions of our injunction statute which cannot be used to control equity proceedings in the Federal courts."

Now I submit that if one part of the law governing injunction cases in the State of Missouri has no application to a bond given in a Federal court or to injunction proceedings in such court, then another part of the State law applicable to such cases should
180 have no such effect. Why is it that the statute and decisions of the court which may bear upon the true construction of the language of a bond which measures the liability cannot control or affect that bond, and yet the rulings of the State courts allowing attorneys' fees as damages shall be applicable. There is no difference in principle. One does not apply to the remedy more than the other. The law in force in one place or the other enters into the contract. If it is the law in force in the jurisdiction where the bond is given, then both the law as to the construction of the language and the law as to the extent of the liability must be considered as entering into and forming part of the contract. On the other hand if it is the law of the place where the suit is brought that is to control, then it must be both the law as to the construction of the language as well as to the extent of the liability. The courts cannot be right in both of its positions. If it adopts the law of the State throughout, it must defeat the recovery because there were no damages adjudged. If it adopts the law of the jurisdiction where the bond was given, there can be no recovery of attorneys' fees because they are not contemplated by the contract made in that jurisdiction. And in this connection it is proper to refer to the

other misconstruction of the views of the Supreme Court of the United States in Bein *v.* Smith. Whatever else may be said about that case,—whatever may be the effect of the attempt to distinguish, subsequently made in the case of Meyers *v.* Block, 120 U. S. 642, there is no just ground to say that there is any impairment of the following statement of the law contained in that opinion ap-
181 plicable to these cases:

"Now there is manifest error in subjecting the parties to an injunction bond given in a proceeding in equity in a court of the United States to the laws of the State. The proceeding in the circuit court of the United States in equity is regulated by the laws of Congress and the rules of this court made under the authority of an act of Congress."

There is a specific and positive ruling of the Supreme Court of the United States supporting the contention of the appellant in that respect, but which has been wholly overlooked and disregarded by this court in its decisions. For this, probably the appellant's counsel is to blame, because, although this language was quoted in the printed argument, yet that case was not specifically cited under point II in connection with the numerous other authorities establishing the same general proposition. While I confess I do not discover the ground of distinction between the cases of Bein *v.* Heath and Meyers *v.* Block attempted to be made in the latter case, and while for the purposes of this argument we may say that the latter case impairs the force of the former so far as the right to recover at all upon the bond is concerned, yet there is no question made concerning the correctness of the proposition asserted in the last quotation from the opinion of Chief Justice Taney in the case of Bein *v.* Heath to the effect that "it is error to subject the parties to an in-
junction bond given in a proceeding in equity in a court of
182 the United States to the laws of the State." This view must have been affirmed in the case of Meyers *v.* Block or the same could never have reached the Supreme Court of the United States.

In concluding these suggestions upon the motion for rehearing, I submit that a proper conception of the nature of the case and of the law applicable should satisfy this court that the rehearing should be granted. But if I have failed to convince the court that that is its duty, then I am driven to insist upon the motion to transfer to the supreme court of the State, and in support of that motion, submit the following farther suggestions:

There are two branches to that motion. One in a sense involves the other along with other matters, and I will therefore consider the broader one first, and that is that the decision of the case as made by this court, if it stands, deprives this appellant of its property without due process of law, and denies it the equal protection of the law, because the decision of this court is made in disregard of and is contrary to the latest rulings of the supreme court of the State of Missouri upon several propositions, and next that it decides Federal questions contrary to the rulings of the courts of the United States.

Upon the first branch of this subject the decision of the court is

in conflict with the last ruling of the supreme court of the State in the case of Brown *v.* Baldwin, 121 Mo., 126, as to the circumstances under which an injunction is to be regarded as an incident to the main case, and as to the circumstances under which attor-
183 neys' fees are not allowable as damages upon an injunction bond, and it is further in conflict with the latest rulings of the supreme court in the cases of Corder *v.* Martin, 17 Mo., 41, and Dorriss *v.* Carter, 67 Mo., 544, to the effect that, where the condition of the injunction bond is that the plaintiff in the injunction suit will pay such damages as may be adjudged against him, there is no breach of the bond and can be no recovery on it until after damages have been previously adjudged. That this decision is at variance with the above several cases upon the propositions therein decided there is no room for reasonable question, and I submit that if this court does not approve of those decisions then the proper practice is to state the variance between the two courts and certify the case to the supreme court. But if the court does not certify the case for that reason alone, there is this farther reason that the decision of this court violates the Constitution and thus presents a constitutional question. The amendment of 1884 makes the latest ruling of the supreme court upon any question the controlling authority in the courts of appeals. There is no discretion in this court to make a conclusive ruling to the contrary of the latest ruling of the supreme court. The constitutional duty of the court under such circumstances is very narrow. Either this court must yield its own views and adopt those of the supreme court or it may express its dissent from the decision of the supreme court, provided it will certify the case to that court. It therefore follows that if this court refuses to certify a case when its decision is at
184 variance with the latest ruling of the supreme court it at once brings its own decision in conflict with the constitution of the State. Every litigant in this court is entitled to have his case decided not simply according to the views of this court alone, but according to the latest ruling of the supreme court upon the question involved, and his right to have such a decision of his case rises higher than the power of this court to make a decision. It arises from the organic law of the State. The right of a litigant to have his cases decided according to the latest ruling of the supreme court comes from the same high source from which this court and the supreme court derive their existence. And if this court decides differently from the latest ruling of the supreme court and will not certify the case to that court, then it at once sets up its own decision in defiance of the very law which gives it being. I am not attempting now to present or discuss the same question that has been up in different forms when efforts have been made to secure the transfer of cases from this court to the supreme court. Those, as I understand, have usually arisen in cases where some dissenting opinion has been filed, but where it was not stated in terms that any member of this court deemed the opinion to be in conflict with the ruling of the supreme court. This is a broader and a deeper proposition that I now present, and that is that, by the constitution

of the State, the power of this court is limited to the extent and the scope and the meaning and the spirit of the latest ruling
185 of the supreme court upon a given question. Therefore anything beyond that scope, or anything contrary to those decisions is not only without the warrant and authority of the Constitution, but is in conflict with its spirit and its terms. As that is the highest law of the land, and as a decision of this court at variance with the latest ruling of the supreme court must stand condemned as being in violation of that constitutional command, the rendering of such a judgment by this court is denying a party the equal protection of the law, and its enforcement is taking from him his property without due process of law. Because these constitutional questions and these constitutional rights are thus involved the jurisdiction to determine them is vested in the supreme court of the State, and for that reason this court should certify the case to the supreme court.

The appellant is entitled to have the case transferred to the supreme court for the further reason that it involves a Federal question. That the supreme court has jurisdiction in such case, and that this court has not, is settled by section 12 of article VI of the constitution of Missouri, and by section 5 of the amendment of 1884 to the constitution. By virtue of those sections "the supreme court has the jurisdiction in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question." If any statute of the United States or any authority exercised under the United States is drawn in question in this case the supreme court has jurisdiction over it, and it should be transferred to that court. That such is
186 the nature of this case does not seem open to discussion.

Whether or not this court may decide those questions as contended for by the appellant is wholly immaterial; the controversy is in the case; the question is presented; the claim is made by the appellant that the law of Congress governing the practice in the Federal court and the rules promulgated under those laws (which it has been held have the force of law) and the authority exercised under the United States are all involved in the making of that bond, and even though this court might not agree with all we contend for, it does not eliminate the Federal question.

Even if the court thinks that the laws of the United States and the authority exercised under the United States were not involved when the United States court in the exercise of its jurisdiction was requiring and was approving the injunction bond which is the subject of this suit, and in the making of it, yet the very fact that the appellant insists that it was, and that this court may hold that it was not, is but emphasizing the presence of the Federal question. If a party contends that the constitution of the State has been violated he is entitled to a ruling of the supreme court upon the question, and so, when we claim that a Federal question is involved, we are likewise entitled to the ruling of the supreme court. This question has been presented in this case from the outset. The presence of it appears upon the face of the plaintiff's petition. It is again

asserted in the defendant's answer. It was contended for in
187 the instructions which were refused. It has been urged at every stage of the case, and if the court does not see fit to grant a rehearing and decide the case for the defendant upon the other propositions, then we insist that for this reason, as well as for the previous one, the case must be transferred to the supreme court.

How far it may be necessary to cite authorities at this time I am not clear, but it can do no harm to call the attention of the court to a few decisions.

The case of Bein *v.* Heath, 12 How. 168, from which quotation has already been made, is a clear authority to the effect that this case involves a Federal question.

The case of Meyers *v.* Block, 120 U. S. 206, which was mentioned in the opinion of this court, is likewise an authority to the same effect. That was a case upon an injunction bond given in the Federal court in Louisiana, which was afterwards sued upon in the State court. An appeal was taken to the supreme court of the State and a writ of error was prosecuted from the Supreme Court of the United States to the supreme court of Louisiana. While the judgment of the State court was affirmed in the United States Supreme Court, yet the jurisdiction of the latter court depended solely upon the presence of the Federal question arising from the circumstance of the bond having been given in the United States court. While the subject of jurisdiction is not discussed at length in the case, yet it is the only ground upon which that jurisdiction could have been
188 maintained. If the court had not had jurisdiction for that reason it would have dismissed the writ of error, whereas it considered the case and rendered judgment affirming the judgment of the State court.

In addition to the above I cite Lamb *v.* Ewing, 54 Fed. 266, which was a suit upon a bond given in a Federal court, and it was held that United States courts had jurisdiction in a suit brought upon such bond regardless of the citizenship of the parties because the same involved a Federal question. Of the same nature is Walker *v.* Bank, 56 Fed. 76, which was a suit upon a bond of a cashier of a national bank.

Also see:

Car Co. *v.* Washburn, 56 Fed. 790;
Wood *v.* Drake, 70 Fed. 881;
Johnson *v.* Christian, 125 U. S. 642;
Bock *v.* Perkins, 139 U. S. 628;
Lacassagne *v.* Chapuis, 144 U. S. 119;
R. R. *v.* Briscoe, 144 U. S. 133;
R. R. *v.* Amato, 144 U. S. 465;
R. R. *v.* Cox, 145 U. S. 593;
Carey *v.* R. R., 161 U. S. 115;
R. R. *v.* Haber, 169 U. S. 613–622.

This last case bears specially upon the point that when the contention is made that a Federal or constitutional question is presented

and the ruling upon that would be decisive of the case one way or the other, then such question is so involved in the case as to
189 require its consideration and as to confer jurisdiction upon the courts which are authorized to pass upon such questions.

GEO. P. B. JACKSON,
For Appellant.

190 And afterwards, on February 6th, 1899, the said court of appeals entered an order overruling said motion for rehearing and to transfer to the supreme court of the State in words and figures as follows, to wit:

191 Kansas City Court of Appeals, October Term, 1898.

FEBRUARY 6TH, 1899.

JOHN S. ELLIOTT, Resp.,
vs.
M., K. & T. R'Y Co., App. } # 5065.

Now at this day the court having fully considered the motions for a rehearing and to transfer to the supreme court, doth consider and adjudge that said motions be and the same are hereby overruled.

STATE OF MISSOURI, *ss:*

I, L. F. McCoy, clerk of the Kansas City court of appeals, do hereby certify that the foregoing is a true and perfect copy of the order of court overruling the motions for a rehearing and to transfer to supreme court, in the above-entitled cause, as the same appears of record in my office.

Attest hand of clerk and seal of said court attached, done at office in Kansas City, Missouri June 28th, 1900.

[Seal Kansas City Court of Appeals.]

L. F. McCOY, *Clerk*,
By S. W. STRODY, *D. C.*

192 And afterwards, on the 2d day of February 1900, the said appellant filed assignment of errors in said cause for the purpose of having the judgment of said Kansas City court of appeals reviewed upon writ of error from the Supreme Court of the United States in words and figures as follows, to wit:

In the Kansas City Court of Appeals of the State of Missouri.

JOHN S. ELLIOTT, Respondent,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Now comes the above-named appellant Missouri, Kansas & Texas Railway Company, and for the purpose of having the judgment of the Kansas City court of appeals of the State of Missouri reviewed

upon writ of error from the Supreme Court of the United States, the said Missouri, Kansas & Texas Railway Company submits the following assignment of errors, to wit:

The said Kansas City court of appeals erred:

I.

In holding and deciding that it had jurisdiction of the above-entitled cause.

II.

In holding and deciding that there was no Federal question involved in this case.

III.

In holding and deciding that the liability upon the injunction bond sued on which had been given in the United States circuit court was subject to the law of the State, and that the measure of the liability upon such bond was not to be determined by the laws or decisions of the courts of the United States.

IV.

In holding and deciding that attorneys' fees could be allowed as damages in an action upon an injunction bond given in a suit pending in a United States circuit court.

193 V.

In holding and deciding that it the said Kansas City court of appeals was not bound by nor required to follow the rulings and decisions of the Supreme Court of the United States concerning the liability upon injunction bonds given in cases pending in United States circuit courts.

VI.

In holding and deciding that the laws of the State of Missouri authorized the recovery of attorneys' fees as damages in a suit upon an injunction bond given in the circuit court of the United States.

GEO. P. B. JACKSON,
Attorney for Missouri, Kansas & Texas Railway Company.

194 STATE OF MISSOURI, } ss:
County of Jackson, }

In the Kansas City Court of Appeals of the State of Missouri.

I, L. F. McCoy, clerk of the above-named court, do hereby certify that the foregoing is a true and complete copy and transcript of the record in the case of John S. Elliott, respondent, *vs.* Missouri, Kansas & Texas Railway Company, appellant, certified from the circuit court of Cooper county, Missouri, of the briefs filed by the respective parties in compliance with the statute and the rules of court, and of

the judgment and opinion of the said Kansas City court of appeals in said case, and of the motion for rehearing and to transfer to the supreme court of the State of Missouri, filed by the appellant in said case, and of the order of the said Kansas City court of appeals overruling said motion, together with the assignment of errors filed by the said appellant, Missouri, Kansas & Texas Railway Company, in said cause, all as the same appear of record and on file in the office of the clerk of said Kansas City court of appeals. And I do further certify that the same are all the proceedings had and all the papers filed in said cause in said court.

Seal Kansas City Court of Appeals.

In witness whereof I have hereunto set my hand and affixed the seal of said court at office in Kansas City, Mo., this 18th day of August, 1900.

L. F. McCOY,
Clerk of Kansas City Court of Appeals of the State of Missouri.

195 UNITED STATES OF AMERICA, *set:*

The President of the United States to the judges of the Kansas City court of appeals for the State of Missouri, Greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you, between John S. Elliott and Missouri, Kansas and Texas Railway Company, a manifest error hath happened, to the great damage of the said Missouri, Kansas and Texas Railway Company, as by its complaint appears.

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., within sixty days from and after the day the citation issued herein bears date, in the said court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what, of right and according to the laws and customs of the United States, should be done.

Seal of the Supreme Court of the United States.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Supreme Court.

Issued at office in Washington city, this 26th day of July, A. D. 1900.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed July 21st, 1900.
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

196 [Endorsed:] United States Supreme Court. John S. Elliott *vs.* Mo. Kas. & Tex. R'y Co. Writ of error. Filed July 30, 1900. L. F. McCoy, clerk.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *set:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said Kansas City court of appeals, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk, and the seal of said court. Issued at office in Kansas City this 18th day of August A. D. 1900.

[Seal Kansas City Court of Appeals.]

L. F. McCOY, *Clerk*,
By —— ——, *Deputy Clerk.*

197 Know all men by these presents that we, the Missouri, Kansas & Texas Railway Company, as principal, and W. S. Stephens and Alex. H. Stephens, as sureties, are held and firmly bound unto John S. Elliott in the full sum of six thousand dollars ($6,000.00), to be paid to the said John S. Elliott, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our successors and representatives firmly by these presents.

Sealed with our seals and dated, this 25th day of June, in the year of our Lord, 1900.

Whereas the above-named Missouri, Kansas & Texas Railway Company is about to sue out a writ of error from the Supreme Court of the United States to the Kansas City court of appeals of Missouri to reverse the judgment rendered in a cause entitled John S. Elliott, respondent, against Missouri, Kansas & Texas Railway Company, appellant, heretofore pending in the said Kansas City court of appeals as the court of last resort for said case in the State of Missouri.

Now, therefore, the condition of this obligation is such that if said writ of error shall be issued and the above-named Missouri, Kansas & Texas Railway Company shall prosecute the said writ of error and if it shall fail to make good its plea, will pay said judgment in favor of John S. Elliott and against said Missouri, Kansas & Texas Railway Company, and answer all costs and damages, then this obligation shall be void; otherwise to remain in full force and virtue.

MISSOURI, KANSAS & TEXAS
RAILWAY COMPANY,
By JAMES HAGERMAN,
General Solicitor.
W. S. STEPHENS.
ALEX. H. STEPHENS.

Bond approved as supersedeas this 21st of July, 1900.

DAVID J. BREWER,
Justice Sup. Ct.

198 If writ of error is allowed, we regard this bond as sufficient.

W. M. WILLIAMS,
JOHN COSGROVE,
Att'ys for Def't.

Endorsed: Filed July 30th, 1900. L. F. McCoy, clerk.

199 UNITED STATES OF AMERICA:

To John S. Elliott, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the Kansas City court of appeals of the State of Missouri, wherein The Missouri, Kansas & Texas Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, one of the justices of the Supreme Court of the United States, this 21st day of July, in the year of our Lord, one thousand and nine hundred.

DAVID J. BREWER,
Justice of the Supreme Court of the United States.

Service of the foregoing citation is hereby acknowledged, this 27th day of July, 1900.

W. M. WILLIAMS,
JOHN COSGROVE,
Attorneys for Defendant in Error.

200 [Endorsed:] (Original.) Mo., Kas. & Tex. R'y Co., P. E. *v.* Jno. S. Elliott, D. E. Citation. Filed Jul- 30, 1900. L. F McCoy, clerk.

Endorsed on cover: File No. 17,889. Missouri, Kansas City, court of appeals. Term No. 148. The Missouri, Kansas & Texas Railway Company, plaintiff in error, *vs.* John S. Elliott. Filed August 25 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN S. ELLIOTT.

No. 148.

In error to the Kansas City Court of Appeals of the State of Missouri.

Stipulation.

It is hereby stipulated by and between the above-named parties, herein acting by their respective attorneys, that in order to relieve the court of unnecessary labor and to avoid encumbering the record and printing a large amount of matter pertaining to the effort of the plaintiff in error (defendant below) to have the case determined in the supreme court of the State of Missouri, the following statement may be accepted as covering said matters, as the same now appear from the exhibits attached to the petition for writ of error and now on file as part of the record in this case; and in lieu thereof this stipulation may be printed as a supplement to the portion of the record already printed.

It is agreed that in the State of Missouri the appellate jurisdiction is vested in a supreme court and in the St. Louis and Kansas City courts of appeals; that the latter has jurisdiction of appeals from Cooper county which are not returnable to the supreme court; that at the time of the appeal in the case of Elliott *v.* Missouri, Kansas & Texas Railway Company the supreme court of the State had appellate jurisdiction over all cases involving $2,500.00, exclusive of costs, and cases involving the construction of the Constitution of the United States or of the State of Missouri, or where the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question, and cases involving the construction of the revenue laws of Missouri, or the title to any office under that State, and the cases involving the title to real estate, or those where a county or other political subdivision of the State, or any officer, is a party, and in all cases of felony (amendment, Mo. Const., 1884, sec. 5, and art. VI, sec. 12); and also had superintending control over the courts of

appeals by mandamus, prohibition and certiorari (amendment, Mo. Const., 1884, sec. 8); and that the courts of appeals had final appellate jurisdiction in all other cases. Appeals do not lie from the courts of appeals to the supreme court, nor writs of error from the supreme court to the courts of appeals. The amount of the judgment in the case of Elliott *vs.* Missouri, Kansas & Texas Railway Company, would make the case returnable to the Kansas City court of appeals, unless it involves the construction of the Constitution of the United States or of the State of Missouri, or is a case where the validity of a treaty or statute of or authority exercised under the United States is drawn in question, while if it involved any such question, the appeal in that case would have been returnable to the supreme court. After the decision of the Kansas City court of appeals, the appellant, Missouri, Kansas & Texas Railway Company, filed a motion for rehearing and to transfer the case to the supreme court, which motion was overruled, and afterwards said railroad company commenced an original proceeding in the supreme court of the State of Missouri, against the judges of the Kansas City court of appeals, seeking to prohibit said judges and said court from farther proceeding in the case, and to cause the same to be certified to the supreme court, the prayer of the petition in said proceeding being as follows:

"Wherefore your petitioner prays the remedy of the writ of prohibition to the said Jackson L. Smith, and to the said James Ellison, and to the said Turner A. Gill, as judges of the said Kansas City court of appeals, prohibiting them from proceeding any farther in the matters aforesaid, and from certifying their said opinion in the case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company to the said circuit court of Cooper county, Missouri, or from issuing or transmitting any mandate in said case to said circuit court of Cooper county, or from authorizing the said circuit court to proceed in any manner or to any extent in the said cause, and prohibiting the said respondents from in any manner or to any extent carrying out their judgment, decision and opinion in the said case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, and to the end that complete justice may be done to your petitioner it farther prays that the said writ may be so framed as to command the said respondents to certify and transmit to this court the record and proceedings in the aforesaid case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, heretofore pending in said Kansas City court of appeals, and to annul any prior proceedings of the respondents as judges of said Kansas City court of appeals in said last-named case."

After due proceedings in accordance with the practice in the supreme court and in such cases, the supreme court refused to grant the prayer of said petition, and denied the relief therein prayed for, and filed an opinion in said case, which is reported in 154 Mo., 300.

There was no other proceeding or means by which the case might

have been taken before the supreme court of the State of Missouri, or judgment of said court secured in said case.

GEO. P. B. JACKSON,
Attorney for Plaintiff in Error.
WILLIAM M. WILLIAMS,
Attorney for Defendant in Error.

[Endorsed:] No. 148. Mo. Kas. & Texas R'y Co. *v.* Jno. S. Elliott. Stipulation to abbreviate record.

[Endorsed:] File No. 17,889. Supreme Court U. S., October term, 1901. Term No. 148. The Missouri Kansas and Texas Railway Co. P. E. *vs.* John S. Elliott. Stipulation of counsel in addition to record. Filed Nov. 16th, 1901.

No. 118

Brief of Jurisdiction for U.S.

Supreme Court of the United States.

Filed June 14, 1902.

OCTOBER TERM, 1901.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

JOHN S. ELLIOTT.

No. 118.

In Error to the Kansas City Court of Appeals of the State of Missouri.

STATEMENT, ARGUMENT AND BRIEF FOR THE PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Fisse-Jones Ptg. Co., 316 Pine St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
JOHN S. ELLIOTT.
No. 148.

In Error to the Kansas City Court of Appeals of the State of Missouri.

STATEMENT.

This writ of error is prosecuted to secure a review and reversal of the judgment of the Kansas City Court of Appeals of the State of Missouri, as the court of last resort in this case, on the theory that the case necessarily involved a Federal question, and that the decision was adverse to the plaintiff in error, denying the defendant a right and an

immunity claimed by it under the law and authority of the United States. The consideration of the case in this Court involves two questions: —

First, whether or not there was a Federal question in the case; and

Second, was it properly raised, so as to authorize this Court to review the judgment of the State court.

In order to a proper understanding I submit the following statement of the circumstances out of which this case originated and upon which the Federal question arose: —

In the year 1893 the defendant in error, Elliott, brought a suit against the Missouri, Kansas & Texas Railway Company in the Circuit Court of Cooper County, in the State of Missouri, to recover about $37,000.00, alleged to be due on account of ties furnished by Elliott to said company. The railway company, defendant in said case, duly removed the same to the United States Circuit Court for the Western District of Missouri (Rec., p. 27), where the plaintiff filed an amended petition at law to recover the amount claimed by him (Rec., p. 25). The defenses relied upon by the railway company requiring a resort to the Equity side of the Court, it became necessary to file a bill in equity to set aside and vacate certain reports of inspections of ties claimed to have been procured through fraud and mistake, and as an incident to said bill in equity the railroad company prayed that the prosecution of the action at law should be enjoined until the determination of the suit in equity. The Chancellor granted a temporary injunction on condition that the railroad company furnish a bond in the sum of $20,000.00 (Rec. p. 6), which was done (Rec., p. 7), and after due proceedings a decree was entered in the United States Circuit Court, granting substantially the relief prayed by the railroad company, and the injunction against the prosecution of the action at law was made perpetual (Rec., p. 9).

Afterwards Elliott, as defendant in that case, prosecuted an appeal to the United States Circuit Court of Appeals, where the decree of the Circuit Court was reversed; and subsequently, on Oct. 19th, 1896, the plaintiff's bill was dismissed (Rec., p. 10).

Afterwards the defendant in error, Elliott, instituted the present suit in the Circuit Court of Cooper County, Mo., returnable to the October Term, 1897, the same being a suit upon a copy of the injunction bond, alleging that the bond was given in pursuance of an order of the United States Circuit Court in the equity case formerly pending therein (the original bond not being filed because it was on file and a part of the record in the United States court); that the injunction had been dissolved; that the defendant had suffered damages in that he had expended a large amount for attorneys' fees, which it was alleged he was entitled to recover on that bond, and then prayed judgment for the penalty of the bond, to be satisfied by payment of $2,000, the damages claimed (Rec., pp. 2–4). To this defendant answered admitting the pendency of the suit in equity in the United States court, the giving of the bond as alleged in that case, and in that court, and the dissolution of the injunction, and alleging farther that the purpose of the injunction was to suspend the prosecution of an action at law while the defendant asserted rights which it claimed, and which could only be established in a court of equity, and then, in accordance with the practice prevailing in the Missouri courts, denied each and every other allegation in the petition, which was equivalent to the specific denial of the allegation that the plaintiff was entitled to recover attorneys' fees as damages on that injunction bond given in the United States court (Rec., p. 4). The case was tried before the court without a jury. At the instance of the plaintiff, and over the objection of the defendant, the court declared the law to be

"that the execution of the bond sued on and the dissolution of the injunction referred to therein are admitted by the parties, and plaintiff is entitled to recover his reasonable personal expenses and attorneys' fees incurred for services of attorneys in procuring the dissolution of said injunction." (Rec., p. 36.)

The defendant asked, and the court refused to give, the following instructions: —

I.

"The court declares the law to be that under the pleadings and evidence the plaintiff is not entitled to recover, and the finding must be for the defendant."

II.

"The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on any sum which he may have paid out or become liable for as attorneys' fees."

VI.

"The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on in this case any amounts which he may have paid out or become liable for as attorneys' fees for services rendered by his attorneys in the equity suit in the United States court mentioned in the pleadings and evidence in connection with the issue in regard to the correctness of the inspection of the ties mentioned therein, nor for the purpose of sustaining the inspection originally made, and upon which the plaintiff had brought his action at law, which was referred to in said equity suit." (Rec., p. 37.)

The other instructions referred to certain other defenses and are not necessary to be mentioned here).

There was a judgment for the plaintiff, defendant in error here (Rec., p. 5). In due time the railway company filed a motion for new trial, on the ground that the court had committed error in giving illegal and improper instructions for the plaintiff, and refusing to give legal and proper instructions for the defendant, and because the judgment was contrary to law (Rec., p. 38). This motion was overruled and exceptions saved, and the defendant filed its bill of exceptions (Rec., p. 39), and in due time the defendant railway company filed its affidavit and bond for appeal, and the Circuit Court ordered the case certified to the Kansas City Court of Appeals (Rec., p. 2). In conformity with the statute and the rule of court, a printed copy of the record of proceedings in the Circuit Court was duly filed in the Kansas City Court of Appeals (Rec., pp. 2–39). Under the law of the State no "assignment of errors" is required, but in lieu thereof and in conformity with the State statute and the rule of court pursuant thereto, there was presented to and filed in the Court of Appeals the brief of the appellant, which under the statute and rule of court consists of a numerical arrangement of points relied upon, with the citation of authorities under each, and such printed argument as the party desires to submit in connection therewith. In this brief, in points 1, 2 and 3 (Rec., pp. 42–43) and in the elaboration thereof (Rec., pp. 48–52), the appellant submitted the proposition that attorneys' fees could not be recovered upon the bond sued on, for the reason that said bond had been given in a United States court, in pursuance of an order of such court, requiring the same, and that the rules of the court, as construed by the decisions of this Court, entered into and became a part of the contract of the bond and established the measure of liability on such bond, and that the law and rules of the

courts of the United States which fixed the measure of liability on the bond excluded attorneys' fees as an element of damage on such bond.

Likewise, in compliance with the statute and rule of court, the respondent, Elliott filed his brief, by point 5 of which (Rec., p. 60) and the enlargement upon same (p. 64) the appellant's contention was resisted, and it was claimed that, notwithstanding the rule prevailing in the Federal Courts, which excludes attorney's fees as an element of damages on an injunction bond, and notwithstanding such damages could not be recovered if the bond was sued on in a Federal court, yet such rule of the Federal court could not control the State court in its judgment in this case.

The case was submitted to the Kansas City Court of Appeals upon these briefs, and subsequently that court rendered a judgment and filed an opinion confirming the judgment of the Circuit Court of Cooper County (Rec. 65–69). In this opinion the Kansas City Court of Appeals stated its understanding of the question submitted by the record in the case as follows: —

"Defendant's objections to the judgment below may be thus stated: —

> 1. That there was no breach of the conditions of the bond, in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that the defendant should pay "all sums of money, damages and costs that shall be adjudged against it," etc.
>
> 2. *It is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal court: that attorneys' fees are not there considered elements of damages in suits on injunction bonds, and that therefore our State courts should apply the same rule on bonds given in the Federal courts.*

3. It is insisted that the trial court erroneously allowed as damages attorneys' fees for defending the entire case; that the injunction was merely incidental to the principal case, and no attorneys' fees were paid to secure its dissolution." (Rec., p. 66.)

In disposing of the second contention that court said, in the opinion: —

"II. The second position of defendant's able counsel is also untenable. His contention is that plaintiff is not entitled in a suit on this bond to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction bond. But it is claimed that because this bond was made in a suit at the time pending in the Federal court, no attorneys' fees should be allowed because contrary to the holding of such courts in like cases.

"Reason and authority, we think, stand opposed to this contention."

For the purpose of establishing that the Kansas City Court of Appeals is the highest tribunal of the State in which this case could be determined, reference is made to the fact that the appellant, railway company, sought to have the case transferred to the Supreme Court of the State, but the application was denied (Rec., pp. 71–90), and afterwards the railway company also instituted in the State Supreme Court a proceeding of "Prohibition" under the Missouri Statute, whereby it unsuccessfully endeavored to suspend the proceeding in the Kansas City Court of Appeals and have the case certified to the Supreme Court (see exhibits attached to the petition for writ of error, and the case of M., K. & T. Ry. Co. *v.* Smith et al., 154 Mo. 300).

The appellate jurisdiction in the State of Missouri is vested in the Supreme Court and in the Kansas City Court of Appeals and the St. Louis Court of Appeals, by virtue of the following sections of Article VI. of the Constitution of the State and of the Amendment of 1884 thereof: —

"SECTION 2. SUPREME COURT — JURISDICTION OF. — The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided." (R. S. Mo. 1899, p. 86.)

Section 12 is as follows: —

"SEC. 12. ST. LOUIS COURT OF APPEALS — JURISDICTION — APPEALS TO SUPREME COURT. — There is hereby established in the city of St Louis an appellate court, to be known as the 'St. Louis Court of Appeals,' the jurisdiction of which shall be co-extensive with the city of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand, five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or

statute of or authority exercised under the United States is drawn in question, in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony." (R. S. Mo. 1899, p. 87.)

This Constitution went into effect in November, 1875, and the appellate courts were as provided in the two above sections until the Amendment of 1884. Under the scheme of the two sections above set forth, all appeals from the various courts in the State, except from the city of St. Louis and the counties of St. Charles, Lincoln and Warren, went originally to the Supreme Court, and in the above named city and counties appeals first went to the St. Louis Court of Appeals, with the right of appeal to the Supreme Court when the amount was in excess of $2,500.00 or when the case involved a constitutional question or where the validity of a treaty or statute of, or authority exercised under, the United States, was drawn in question, etc. In all other cases the judgments of the St. Louis Court of Appeals were final.

In 1884 the Constitution was amended so as to create another Court of Appeals, known as the Kansas City Court of Appeals, and the jurisdiction of the St. Louis Court of Appeals was extended over the eastern portion of the State, while the Kansas City Court of Appeals was given jurisdiction over the western portion. Appeals from the Circuit Courts in all cases not involving over $2,500.00, and not of the character of cases which were formerly appealable to the Supreme Court from the St. Louis Court of Appeals by virtue of Sec. 12, previously quoted, went directly to the Courts of Appeals, and the judgments of

such courts of appeals were final, subject to the superintending control of the Supreme Court, as appeared by the following sections of the Amendment of 1884: —

"SEC. 1. ST. LOUIS COURT OF APPEALS — EXTENDED JURISDICTION.—The jurisdiction of the St. Louis Court of Appeals is hereby extended so as to be co-extensive with the counties of * * * (Naming about half the counties in the State)". (R. S. Mo. 1899, p. 92.)

"SEC. 2. KANSAS CITY COURT OF APPEALS — JURISDICTION — TERMS — JUDGES.— There is hereby established at Kansas City an appellate court, to be known as the Kansas City Court of Appeals, the jurisdiction of which shall be co-extensive with all the counties in the State except those embraced in the jurisdiction of the St. Louis Court of Appeals. * * *" (R. S. Mo. 1899, p. 93.)

"SEC. 5. SUPREME COURT — EXCLUSIVE APPELLATE JURISDICTION OF.— In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the Circuit Courts, and to courts having the jurisdiction pertaining to Circuit Courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts." (R. S. Mo. 1899, p. 93.)

"SEC. 6. COURTS OF APPEALS CASES MAY BE CERTIFIED TO SUPREME COURT, WHEN. — When any one of said courts of appeals shall in any cause or proceeding render a decision which any of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term, and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the

Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." (R. S. Mo. 1899, p. 93.)

SEC. 8. SUPREME COURT — SUPERINTENDING CONTROL OF. — The Supreme Court shall have superintending control over the courts of appeals by mandamus, prohibition and *certiorari*." (R. S. Mo. '99, p. 94.)

The Kansas City Court of Appeals was thus shown to be the court of last resort for this case. This is put beyond any possibility of question by the stipulation which is filed and printed by way of supplement to the record formerly printed in the case, as follows: —

In the Supreme Court of the United States.

October Term, 1901.

No. 148.

Missouri, Kansas & Texas Railway Company,
Plaintiff in Error.

vs.

Jonh S. Elliott.

In Error to the Kansas City Court of Appeals of the State of Missouri.

STIPULATION.

It is hereby stipulated by and between the above named parties, herein acting by their respective attorneys, that, in order to relieve the court of unnecessary labor and to avoid incumbering the record and printing a large amount of

matter pertaining to the effort of the plaintiff in error (defendant below) to have the case determined in the Supreme Court of the State of Missouri, the following statement may be accepted as covering said matters, as the same now appear from the exhibits attached to the petition for writ of error and now on file as part of the record in this case; and in lieu thereof this stipulation may be printed as a supplement to the portion of the record already printed.

It is agreed that in the State of Missouri the appellate jurisdiction is vested in a Supreme Court and in the St. Louis and Kansas City Courts of Appeals; that the latter has jurisdiction of appeals from Cooper County which are not returnable to the Supreme Court; that at the time of the appeal in the case of Elliott *v.* Missouri, Kansas & Texas Railway Company the Supreme Court of the State had appellate jurisdiction over all cases involving $2,500.00, exclusive of costs, and cases involving the construction of the Constitution of the United States or of the State of Missouri, or where the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question, and cases involving the construction of the revenue laws of Missouri, or the title to any office under that State, and the cases involving the title to real estate, or those where a county or other political subdivision of the State, or any officer, is a party, and in all cases of felony (Amendment, Mo. Const., 1884, Sec. 5, and Art. VI, Sec 12); and also had superintending control over the Courts of Appeals by mandamus, prohibition and certiorari (Amendment, Mo. Const., 1884, Sec. 8); and that the Courts of Appeals had final appellate jurisdiction in all other cases. Appeals do not lie from the Courts of Appeals to the Supreme Court, nor writs of error from the Supreme Court to the Courts of Appeals. The amount of the judgment in the case of Elliott *v.* Missouri, Kansas and Texas Railway Company, would make the case returnable to the Kansas City Court of Appeals, unless it involves the construction of the Constitution of the United States or of the State of Missouri, or is a case where the validity of a treaty or statute of or authority exercised under the United States is drawn in question, while if it involved any such question the appeal in that case would

have been returnable to the Supreme Court. After the decision of the Kansas City Court of Appeals the appellant, Missouri, Kansas & Texas Railway Company, filed a motion for rehearing and to transfer the case to the Supreme Court, which motion was overruled, and afterwards said railroad company commenced an original proceeding in the Supreme Court of the State of Missouri, against the Judges of the Kansas City Court of Appeals, seeking to prohibit said Judges and said Court from farther proceeding in the case, and to cause the same to be certified to the Supreme Court, the prayer of the petition in said proceeding being as follows :—

"Wherefore your petitioner prays the remedy of the writ of prohibition to the said Jackson L. Smith, and to the said James Ellison, and to the said Turner A. Gill, as Judges of the said Kansas City Court of Appeals, prohibiting them from proceeding any farther in the matters aforesaid, and from certifying their said opinion in the case of John S. Elliott *v.* Missouri, Kansas and Texas Railway Company to the said Circuit Court of Cooper County, Missouri, or from issuing or transmitting any mandate in said case to said Circuit Court of Cooper County, or from authorizing the said Circuit Court to proceed in any manner or to any extent in the said cause, and prohibiting the said respondents from in any manner or to any extent carrying out their judgment, decision and opinion in the said case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, and to the end that complete justice may be done to your petitioner it farther prays that the said writ may be so framed as to command the said respondents to certify and transmit to this court the record and proceedings in the aforesaid case of John S. Elliott *v.* Missouri, Kansas & Texas Railway Company, heretofore pending in said Kansas City Court of Appeals, and to annul any prior proceedings of the respondents as Judges of said Kansas City Court of Appeals in said last named case."

After due proceedings in accordance with the practice in the Supreme Court and in such cases, the Supreme Court refused to grant the prayer of said petition, and denied the relief therein prayed for, and filed an opinion in said case, which is reported in 154 Mo. 300.

There was no other proceeding or means by which the

case might have been taken before the Supreme Court of the State of Missouri, or judgment of said Court secured in said case.

GEO. P. B. JACKSON,
Attorney for Plaintiff in Error.

WILLIAM M. WILLIAMS,
Attorney for Defendant in Error.

Thereafter the railway company filed in the Kansas City Court of Appeals its assignment of errors, for the purpose of having the judgment of said Kansas City Court of Appeals reversed upon writ of error from this court, as follows: —

"The said Kansas City Court of Appeals erred: —

I.

In holding and deciding that it had jurisdiction of the above-entitled cause.

II.

In holding and deciding that there was no Federal question involved in this case.

III.

In holding and deciding that the liability upon the injunction bond sued on, which had been given in the United States Circuit Court, was subject to the law of the State, and that the measure of the liability upon such bond was not to be determined by the laws or decisions of the courts of the United States.

IV.

In holding and deciding that attorneys' fees could be allowed as damages in an action upon an injunction bond given in a suit pending in a United States Circuit Court.

V.

In holding and deciding that it, the said Kansas City Court of Appeals, was not bound by nor required to follow the rulings and decisions of the Supreme Court of the United States concerning the liability upon injunction bonds given in cases pending in United States Circuit Courts.

VI.

In holding and deciding that the laws of the State of Missouri authorized the recovery of attorneys' fees as damages in a suit upon an injunction bond given in the Circuit Court of the United States."

(Record, p. 91.)

Writ of error issued, and due return has been made thereto (Record, pp. 92 and 93). Bond was given and approved (Record, p. 93), and citation was duly served (Record, p. 94).

GEO. P. B. JACKSON,
For Plaintiff in Error.

POINTS.

I.

1. The case involves a Federal question, because the construction of the contract evidenced by the Injunction Bond, draws in question an authority exercised under the United States, and because the measure of liability upon that bond depends upon the laws of the United States, and rules of court made by authority of such laws.

Bein *v.* Heath, 12 How. 168;
Osborn *v.* Bank of U. S., 9 Wheat. 817;
Myers *v.* Block, 120 U. S. 206;
Aiken *v.* Leathers, 40 La. Ann. 23;
Leslie *v.* Brown, 90 Fed. 171; 56 U. S. Ct. of Ap. Rep. 727;
Johnson *v.* Christian, 125 U. S. 642;
Lacassagne *v.* Chapins, 144 U. S. 119;
R. R. *v.* Briscoe, 144 U. S. 133;
R. R. *v.* Amato, 144 U. S. 465;
R. R. *v.* Cox, 145 U. S. 593;
Carey *v.* R. R., 161 U. S. 115;
R. R. *v.* Harber, 169 U. S. 613-622;
Wood *v.* Drake, 70 Fed. 881;
Walker *v.* Bank, 56 Fed. 76;
Houser *v.* Clayton, 3 Woods, 273;
Johnson *v.* Banking Assn., 33 La. Ann. 479;
Bock *v.* Perkins, 139 U. S. 628;
Feibelman *v.* Packard, 109 U. S. 421;
Live Stock Co. *v.* Butchers' Union, 120 U. S. 141.

2. Attorneys' fees are not recoverable on injunction bonds given in the United States courts.

Oelrichs *v.* Spain, 15 Wall. 211;
Bein *v.* Heath, 12 How. 168.

3. There can be no recovery of damages in an injunction suit except on the injunction bond. The right of recovery depends entirely upon the bond.

St. Louis *v.* St. Louis Gas Co., 82 Mo. 349;
Teasdale *v.* Jones, 40 M. A. 243;
Campbell *v.* Carroll, 35 M. A. 640;
Keber *v.* Bank, 4 M. A. 195.

4. The law in force at the time the bond is made is to be considered as incorporated in it, and a part of the contract.

Mix *v.* Vail, 86 Ill. 40;
2 Am. & Eng. Enc. of Law, 466g and 466i.

5. Where there is no statute prescribing the conditions of the bond, they are determined by the rules of the court and the discretion of the chancellor.

Murfree on Official Bonds, Sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
Nolan *v.* Johns, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6.
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176, 180.

6. The bond is a part of the record in the case and of the court in which it is given.

Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Murfree on Official Bonds, Sec. 401.

Therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case.

II.

The question was so presented as to authorize this court to review the judgment of the State court.

1. It was so necessarily involved in the case stated in the petition and in the defense relied upon that the court could not render judgment without passing upon the effect of the authority exercised by the United States Circuit Court in which the bond sued on was given.

Cases cited under Point I. and
R. R. *v.* Chicago, 166 U. S. 226;
Oxley Stave Co. *v.* Butler Co., 166 U. S. 648;
Kipley *v.* Illinois ex rel., 170 U. S. 182;
R. R. *v.* Homestead Co., 123 U. S. 552;
Bridge Prop's *v.* Land and Imp. Co., 1 Wall. 116;
Furman *v.* Nichol, 8 Wall. 44.

2. The entire record, as originally filed in the Kansas City Court of Appeals, taken altogether, shows that there was drawn in question an authority exercised under the United States, and that the defendant railway company was claiming an immunity from liability for attorney's fees as damages on the injunction bond sued on, by virtue of the laws of the United States and the rules of the United States court as construed and applied by this court.

3. Under the decisions and "Code of Civil Procedure," of the State of Missouri (Laws of Missouri, 1889, pp. 205–210; and Vol. 1, Rev. Stat. of Mo. 1889, pp. 296–304), the briefs filed in the Kansas City Court of Appeals became part of the Record in the case, and may properly be resorted to to ascertain

what questions were presented for determination. The briefs of counsel on both sides filed in that court clearly show that the Federal question previously mentioned was distinctly presented, and the immunity claimed by the appellant and resisted by the respondent.

Formerly the practice in Missouri required an appellant or plaintiff in error to file assignments of error in the appellate court, and also required joinder in error by the respondent (Secs. 3764 and 3765, Revised Statutes of Mo. 1879), but in the revision of the Code of Practice of Missouri, made in 1889, these sections were omitted and there was no provision made requiring such assignment of errors to be filed. See Art. XII., entitled "Of Practice in the Supreme Court and Courts of Appeals," Rev. Stat. of Missouri, 1889, pp. 585 to 593 (1 R. S. of Mo. 1899, pp. 296 to 304).

Sec. 2301, Rev. Stat. of Mo. 1889 (being Sec. 863, Vol. 1, Rev. Stat. of Mo. 1899), reads as follows: —

> "SEC. 2301. STATEMENT AND BRIEF TO BE FILED. WHEN. — On appeals and writs of error each party shall, on or before the day next preceding the day on which the cause is docketed for hearing, make out and furnish the court with a clear and concise statement of the case, and the points intended to be insisted on in argument."

The rules governing practice in the Kansas City Court of Appeals, adopted in pursuance of this statute, are found at the end of each volume of the Missouri Appeal Reports.

No provision is made in these rules for an assignment of errors, other than that required in the briefs by Rules 15 and 17, which are as follows: —

> "RULE 15. ABSTRACT AND BRIEFS TO BE FILED AND SERVED. — In all cases the appellant or plaintiff in

error shall file with the clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof."

"RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF.— The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct."

See Appendix to Vol. 77 Mo. Ap. Rep.

In view of this change of the statute it has been ruled that "It is not now required to assign and join error more than such assignment may be made by briefs required by Section 2301 of the late revision — 1889 — (being Sec. 863, R. S. Mo., 1899).

Donnell Mfg. Co. *v.* Hart, 40 M. A. 512;
Mo. Valley Stone Works *v.* Brown, 50 M. A. 407–413.

By virtue of these statutory provisions of the State governing the practice of the appellate courts, and of the reasoning of this Court with reference to the opinions of the State courts, the briefs of counsel become part of the record for the purpose of ascertaining what questions were presented in the State court.

Murdoch *v.* Memphis, 20 Wall. 590–633.
Gross *v.* Mortgage Co., 108 U. S. 477;
Sayward *v.* Denny, 158 U. S. 180.

4. The opinion of the Kansas City Court of Appeals is part of the record in the case by virtue of Section 15, Article VI, Constitution of Missouri, which reads: —

> "The opinions of said court shall be in writing, and shall be filed in the cases in which they shall be respectively made, and *become parts of their record;* and all laws relating to the practice in the Supreme Court shall apply to this court, so far as the same may be applicable." (1 R. S. Mo. 1889, p. 88.)

Also under Rule 8 of this court the opinion of the State court is a part of the record for the purpose of ascertaining what points were presented to and decided by that court.

Egan *v.* Hart, 165 U. S. 188.

The opinion of the Kansas City Court of Appeals clearly shows that the Federal question was raised and was decided adversely to the contention of plaintiff in error, and the right and immunity claimed by plaintiff in error, under the rules and authority of the United States Circuit Court, were denied.

III.

The Kansas City Court of Appeals is the highest court in the State of Missouri in which a decision could be had in the case of Elliott *v.* Missouri, Kansas & Texas Railway Company.

That court denied the motion to transfer the case to the Supreme Court,— while the Supreme Court refused to cause the case to be certified from the Court of Appeals upon a petition for that purpose.

Gregory *v.* McVeigh, 23 Wall. 294;
Stanley *v.* Schwalby, 162 U. S. 255;
Bacon *v.* Texas, 163 U. S. 207.

Const. of Mo., Art. VI, Secs. 2 and 12 (1 R. S. Mo., 1899, pp. 86 and 87), which read as follows: —

"Sec. 2. **Supreme Court — Jurisdiction of.**— The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided."

"Sec. 12. **St. Louis Court of Appeals — Jurisdiction —Appeals to Supreme Court.**— There is hereby established in the city of St. Louis an appellate court, to be known as the "St. Louis Court of Appeals," the jurisdiction of which shall be co-extensive with the city of St. Louis, and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony."

Amendment, Mo. Const. of 1884, Secs. 1, 2, 5, 6 and 8 (1 R. S. Mo. 1899, pp. 92, 93 and 94), which read as follows: —

"SECTION 1. **St. Louis Court of Appeals—Extended Jurisdiction.**— The jurisdiction of the St. Louis Court of Appeals is hereby extended so as to be co-extensive with the counties of Monroe, Shelby, Knox, Scotland, Clark, Lewis, Marion, Ralls, Pike, Lincoln, Warren, St. Charles, St. Louis, Jefferson, Ste. Genevieve, Perry, Cape Girardeau, Scott, Mississippi, New Madrid, Pemiscot, Dunklin, Stoddard, Wayne, Bollinger, Madison, St. Francois, Washington, Franklin, Crawford, Iron, Reynolds, Carter, Butler, Ripley, Oregon, Shannon, Dent, Phelps, Pulaski, Texas, Howell, Ozark, Douglas, Wright, Laclede, Webster, Christian, Taney, Stone, Greene, Lawrence, Barry, Newton and McDonald, as well as the city of St. Louis; and each judge thereof, when hereafter elected, shall be elected by the qualified voters of the counties and of the city under the jurisdiction of said court, and shall be a resident of the said territorial appellate district."

"Sec. 2. **Kansas City Court of Appeals — Jurisdiction, Terms, Judges.** — There is hereby established at Kansas City an appellate court, to be known as the Kansas City Court of Appeals, the jurisdiction of which shall be co-extensive with all the counties in the State except those embraced in the jurisdiction of the St. Louis Court of Appeals. There shall be held in each year two terms of said Kansas City Court of Appeals, one on the first Monday of March and one on the first Monday of October. The Kansas City Court of Appeals shall consist of three judges, who shall be elected by the qualified voters of the counties under the jurisdiction of said court, and shall be residents of said territorial appellate district."

"Sec. 5. **Supreme Court — Exclusive Appellate Jurisdiction of.** — In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the Circuit

Courts and to courts having the jurisdiction pretaining to Circuit Courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts."

"Sec. 6. **Courts of Appeals Cases may be Certified to Supreme Court, when.** — When any one of said courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term, and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

"Sec. 8. **Supreme Court — Superintending Control of.** — The Supreme Court shall have superintending control over the courts of appeals by mandamus, prohibition and *certiorari*."

State ex rel. Campbell *v.* St. Louis Court of Appeals, 97 Mo. 276–283;
M. K. & T. Ry. Co. *v.* Smith et al., 154 Mo 300.

This point is placed beyond controversy or dispute by the stipulation printed as Supplemental Record.

GEO. P. B. JACKSON,
For Plaintiff in Error.

ARGUMENT.

I.

The Kansas City Court of Appeals was the Highest Court in the State in Which a Judgment Could be had in this Case.

At the outset I desire to prevent any misapprehension as to the purpose of presenting or calling attention to the motion filed in the Kansas City Court of Appeals for a rehearing and to transfer the case to the Supreme Court of the State of Missouri, or to the prohibition proceedings in the Supreme Court, in the case of M. K. & T. R'y Co. *v.* Smith et al., 154 Mo. 300. Neither this motion in the Court of Appeals nor this prohibition proceeding in the Supreme Court is referred to or relied upon by the plaintiff in error as furnishing any ground or reason for the issuance of the writ of error in this case, or as establishing that a Federal question was so raised as to confer jurisdiction on this court for the purpose of reviewing the judgment of the highest court of the State in which judgment might be had in this case. It will probably be claimed here, as it was in opposition to the petition for the writ of error, that the case was not in a condition to entitle the plaintiff in error to have it reviewed in this Court. I think that probably the case of Johnson *v.* Risk, 137 U. S. 300, states the rule in as comprehensive and restrictive terms as we will find it anywhere, as follows: —

> "To give this Court jurisdiction to review a judgment of the State court, it must appear affirmatively not only that a Federal question was presented therein

for decision, to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

And, farther, I understand the rule to be that if there is another question upon which the decision might properly be based, this Court will not interfere, although there is a Federal question in the case, unless the judgment necessarily involves an adverse decision upon that Federal question, and still farther, that a writ of error will not issue to review a judgment of the State court on the ground of the presence of a Federal question, when such question is for the first time presented in a motion for rehearing. It is within the limits of these rules that the plaintiff in error presents the questions involved in this case, and therefore does not rely upon anything appearing in the motion for rehearing and to transfer to the Supreme Court, which was filed in and overruled by the Kansas City Court of Appeals, nor anything that appears in the prohibition proceeding in the Supreme Court of the State, which was decided adversely to this plaintiff in error, as establishing the presence of a Federal question in the case of Elliott *v.* M. K. & T. R'y Co., to review which the present writ of error is sued out.

The sole purpose of calling attention to these matters is to put the case in a proper position to justify the issuing of the writ of error from this Court to the Kansas City Court of Appeals, which is not ordinarily considered the Court of last resort in the State.

Our contention was that because of the presence of a Federal question in this case the jurisdiction of the appeal from the Cooper Circuit Court was in the Supreme Court

of the State instead of in the Kansas City Court of Appeals. Such is the provision of the Constitution of the State, and it was so held in M. K. & T. Ry. Co. *v.* Smith, 154 Mo. 300. Hence, if, without some explanation, an application had been made for a writ of error to the Kansas City Court of Appeals it would have been denied, for the reason that the case had not been determined by the court of last resort. Therefore, in order to bring the case within the ruling of this Court in the case of Bacon *v.* State of Texas, 163 U. S. 207, and similar cases, cited in Point III. of the Brief, I direct attention first to the motion in the Kansas City Court of Appeals. That was not only a motion for rehearing and to vacate the judgment previously entered in the Kansas City Court of Appeals, but also to transfer the case to the Supreme Court of the State, because of the presence of a Federal question, which motion was overruled. That is now referred to to show that the Kansas City Court of Appeals refused to surrender its jurisdiction over the case or to transfer it to the Supreme Court.

Then to show that plaintiff in error had exhausted all means for a review in the Supreme Court of the State, I have presented the necessary papers to show the application to the Supreme Court of the State for a writ of prohibition and certiorari against the judges of the Kansas City Court of Appeals, seeking to suspend any farther action by the latter Court in the case of Elliott against Ry. Co., and to cause the record in the same to be certified to the Supreme Court, on the ground that the case involved a Federal question (which could be done in the prohibition proceeding, State ex rel. *v.* St. Louis Court of Ap., 97 Mo. 276–283). In connection with this application I have also presented the evidence of the judgment of the Supreme Court, denying the relief thus sought, thus bringing the case within the decisions of

this Court to the effect that under such circumstances a writ of error would properly issue to the Kansas City Court of Appeals, if warranted by the other facts. In view of the stipulation that has been printed as supplemental record in this case, it will not be contended that there was anything else that this plaintiff in error might have done in order to secure a judgment from the Supreme Court of the State in the case of Elliott *v.* M. K. & T. R'y Co., and that therefore, under the circumstances, the Kansas City Court of Appeals was the highest court of the State of Missouri in which a judgment could be obtained in this case.

Having thus established the propriety of suing out a writ of error from this Court to the Kansas City Court of Appeals, no farther attention should be paid to the motion for rehearing and to transfer to the Supreme Court, filed in the Court of Appeals, nor to the prohibition proceeding in the Supreme Court.

II.

The question relied on as the Federal question, was presented to and decided by said Court adversely to the plaintiff in error, without which adverse decision the Court could not have rendered the judgment which it did.

The Federal question which the plaintiff in error insists was involved and adversely decided in this case, is that the extent of liability under or measure of damages recoverable upon the injunction bond sued upon is to be determined by the rule prevailing in the Federal court in which the bond was given; that the bond having been required by the United States Circuit Court of the Western District of Missouri in an equity suit, commenced and pending in that Court, the law governing that Court with reference to the

measure of liability upon such bond (which excludes attorneys' fees from the damages that may be recovered), entered into and became a part of the contract evidenced by the bond, and therefore an authority exercised under the United States was drawn in question. The consideration of this case involves a twofold question: first, whether there was or is a Federal question involved, and secondly, whether it was so presented as to call for the decision of the State court upon it.

Along with these questions there is another, about which there can be no dispute, and which may therefore as well be disposed of before considering the other propositions;— and that is, if there was a Federal question properly presented for decision, was the decision adverse to the plaintiff in error, and was it so essential to the judgment rendered as to justify a review of the case by this Court? The suit of Elliott against the Railway Company, in which this writ of error is prosecuted, was an action on an injunction bond to recover damages, almost the entire amount claimed being attorneys' fees for which Elliott claimed to have become responsible to his attorney. The plaintiff in error, as defendant in that case, contended that attorneys' fees could not be recovered on that bond. Both the trial and appellate courts in the State denied this contention, and held that attorneys' fees were recoverable, and awarded judgment for the entire amount sued for; therefore, the question was decided adversely to the plaintiff in error.

While it is true that there were other defenses made in the case, yet they were not of a character that avoided the decisive effect of the defense previously mentioned, — that attorney's fees were not recoverable upon that bond. These other defenses were that no damages having been adjudged against the principal in the bond, there could be

no recovery under the conditions of that bond; and, next, that as no step had been taken toward the assessment of damages at the same term of court at which the equity case was formally disposed of, as was required by the State practice, there could be no recovery; and, lastly, that there could be no recovery of attorneys' fees, because the injunction bond was a mere incident to a suit brought for another purpose.

While it is true that a ruling in favor of the defendant in that case (plaintiff in error here) would have been sufficient to defeat a recovery, yet it does not follow that a contrary ruling would have entitled the plaintiff to a judgment, regardless of the ruling upon the first defense that attorneys' fees are not recoverable on injunction bonds given in the United States courts. The defenses were independent of each other. Any one of them was a good and complete defense in itself, yet in order that the plaintiff might recover it was necessary that the Court should decide in his favor upon every one of those defenses. Even if the State courts had decided as they did, in favor of the plaintiff, upon the three defenses last mentioned, yet he was not then entitled to a recovery, because there still remained the other contention and defense that, notwithstanding the Court might hold that there could be a recovery upon this bond, although there had not been any previous adjudication of damages, and, notwithstanding the Court might hold that there could be a recovery although there had been no action taken to assess damages at the term at which the final decree was entered in the equity case, and, notwithstanding the Court might decide that damages could be recovered although the injunction was a mere incident to a suit instituted for another principal purpose, yet no judgment could have been given for damages on account of attorneys' fees paid, or liability therefor incurred, if the Court had also decided, as the defendant

in that case contended, that such attorneys' fees were not an element of damages, recoverable upon an injunction bond given in the United States court. In addition to the rulings favorable to the plaintiff upon the other defenses, it was also necessary that the Court should rule in his favor upon this last proposition and decide that attorneys' fees were recoverable on such bond; and therefore the decision which we have previously found was made adversely to the defendant, was necessary to the judgment actually rendered. Hence there can be no application in this case of the rule which denies jurisdiction to this Court, even though a Federal question may have been decided, if there were other questions decided in the case "broad enough to maintain the judgment independent of any Federal question." In the case of Elliott *v.* Ry. Co., there could have been no judgment in favor of the plaintiff, unless the Court had decided the Federal question adversely to the railroad company.

I think, therefore, we may now fairly say that the case clearly and distinctly presents the twofold proposition above suggested: —

1. Was there a Federal question in the case: and
2. Was it sufficiently presented in the State court?

III.

Was there and is there a Federal question in this case?

Our consideration of this branch of the case might be limited to the single question whether or not a suit upon an injunction bond given in a Federal court involves a Federal question for the purpose of determining the question of jurisdiction. Before proceeding to a more particular consideration of that question it is well to note some of the distinctions that have been made upon the question of juris-

diction. There is a marked distinction between the jurisdictional facts necessary in cases of removal from State to Federal courts, and in the jurisdiction of the Supreme Court of the United States to review the decisions of the highest court of a State. The ground for removal in the several acts of Congress is restricted in that respect to suits "arising under the Constitution and laws of the United States," whereas the power to review the judgments of the highest courts of the States may be exercised where an "authority exercised under the United States is drawn in question." The distinction was specially pointed out in the case of Carson *v.* Dunham, 121 U. S. 421. In that case the court was considering the jurisdiction of the United States Circuit Court as depending upon the removal from a State court, where the suit was not shown to be one "distinctly involving the laws of the United States," and in that case the court said: —

> "This suit therefore as now presented is not one arising under the Constitution and laws of the United States within the meaning of that term as used in the removal act of 1875; but if in deciding the case the highest court of the State shall fail to give full effect to the authority exercised under the United States as shown by the judgments and decrees of their courts relied upon to support the title of Mrs. Carson, its decision in that regard may be the subject of review by this court under section 709."

And again in the case of Provident Assn. *v.* Ford, 114 U. S. 635, it was held that a case could not be removed from a State to the Federal court simply because it was an action upon a judgment of a United States court. In the course of the opinion the court said that a judgment of the United States court as such was no

more than a security of record showing a debt due from one person to another. It was no more that if he had brought suit on a bond of the United States or had brought trover for the withholding of such securities. "It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more unless some question is raised in the case (as might be raised in any of the cases specified) distinctly involving the laws of the United States, such a question for example as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States." Keeping in mind the distinction between the grounds of removal and the grounds of jurisdiction to review the decisions of the highest tribunal of the State, it follows from the previous opinion that if a question is raised and insisted upon as involving authority under the United States, then clearly it would be a case where a writ of error would lie to the Supreme Court of the State. We must have regard to the cause of action sued on. It is true it is an injunction bond, but that is not the full measure of the contract. It is not from the words found in that bond alone that we are to ascertain the rights and liabilities of the respective parties. There is nothing there which says that any particular matter shall be an element of damages. We are to turn to something outside of that which the parties have written in the bond itself for guidance in that matter, and necessarily that must be to the law which controls in such a case. True the Court of Appeals in its opinion says, and it cites authority to the effect that in such case it is not the law which governs the Federal court where a bond is made that is to control, but the rule of law which is applied to similar bonds in the court where a bond may be sued upon that is to determine the extent of the liability originally

assumed by the making of the bond. The correctness of that position is now before this court. We are now seeking to determine whether or not the cause of action upon the injunction bond involves authority under the United States, or what is equivalent thereto, the duties, liabilities and immunities existing under the exercise of authority of the United States. It is not necessary to cite cases to establish the proposition that the law in force where a contract is made enters into and forms a part of that contract. Without entering into a discussion I submit that the following propositions are fully supported by reason and authority: that the law in force in the jurisdiction where the bond is made at the time it is made is to be considered as incorporated in it and as a part of the contract; that where there is no statute prescribing the conditions of the bond they are determined by the rules of court which take the place and have the effect of statutes, and that such a bond is a part of the record in the case, and in the court in which it is given, and therefore the law and the rules of practice in the Federal court entered into and became a part of the bond sued on in the case of Elliott *v.* Ry. Co.

Mix *v.* Vaile, 86 Ill. 40;
2 A. & E. Enc. of Law, 466;
Murfree on Official Bonds, Sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Nolan *v.* Johns, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6;
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176–180.

It seems to be a self-evident proposition that if the law in force in the jurisdiction where the bond is given is a part of the contract, then necessarily that law and the practice and authority exercised under it are involved in any suit upon that contract.

An injunction bond is as much a part of the proceeding in a court as any other act that may be done in a case, and while the bond may be sued on in any other court, yet the rights and liabilities arising upon it ought to be determined from the terms of the bond itself with reference to the rules of law and practice governing the court by which the bond was required. It is settled by the authorities cited above that the law in force at the time an injunction bond is given is to be considered as incorporated in it, and as part of the contract. This is a general rule applicable to all contracts. And it is also settled that where there is no statute prescribing the conditions of a bond, they are to be determined by the rules of the court in which the bond is given or by the discretion of the chancellor. So much is the bond a part of the proceeding in the particular court that it is regarded as a part of the record in that case. In the case at bar the plaintiff sued upon a copy of the bond because the original was a part of the records of the Federal court at Jefferson City, where it still remains. The bond is so far governed by the statute or the rules of practice governing the court in which it is given that any conditions or obligations beyond those required by the statute are void, and will not be enforced. This was so held by the St. Louis Court of Appeals in Rubelman Hardware Co. *v.* Greve, 18 M. A. 6, and by Kansas City Court of Appeals in Nolan *v.* Johns, 27 M. A. 502. As there is no statute regulating injunction bonds in the Federal courts the rules and practice in those courts take the place of the statute, and everyone giving a bond of that character in the United States court is to be considered as having made the bond with reference to the liabilities and subject to the conditions established and recognized by such rules and practice. The promulgated rules and the rules of law established by the decided cases in those courts must be understood to be incorporated in and to become a part of the contract evidenced

by the bond, and therefore the obligation of the maker of the bond or the right to recover by the defendant in the injunction suit is to be determined by the measure of liability or right created and recognized by the rules and decisions of the Federal courts, and not by the statute of a State designed to regulate similar bonds given in the State courts.

The Kansas City Court of Appeals, itself, conceded the proposition we are contending for, in the opinion in this case, of which we complain because of the inconsistency of the court in afterwards repudiating, as unsound, the very principle which it invoked as an answer to another contention made in that court. It was claimed by the appellant (plaintiff in error here) that either the law of the United States courts or the law of the State of Missouri should govern in its entirety; and if the Kansas City Court of Appeals should deny the position contended for by the appellant there, namely, that under the law as applied by the United States court, where the bond was given, attorneys' fees could not be considered an element of damage on the bond, but that on the contrary, the law of the State which allowed such fees would control, then the law of the State in another particular should also control, to wit: that in order to entitle a party to recover upon an injunction bond, there must be an assessment of damages at the term at which the injunction is dissolved This alternative proposition was submitted in point IV of the brief filed in the Court of Appeals (Record, p. 43). In disposing of that the Court of Appeals, in its opinion (Record, p. 66), says: "Defendant's first (?) contention is based largely on a line of cases decided by our Supreme Court, among which is Dorriss *v.* Carter, 67 Mo. 554, holding that in a suit on a statutory injunction bond no action for damages can be sustained until such damages have been assessed by the court dissolving the injunction. In our

opinion, these cases have no application here, since they are based on the provisions of our injunction statute, *which cannot be used to control equity proceedings in the Federal Courts.*"

I suppose it will not be disputed that if the measure of liability on this bond is to be ascertained by the rules and the law governing the court in which the bond was given, then the plaintiff should not have recovered and the judgment should be reversed. In the first place, it will be noticed that the principal amount of damage claimed was on account of attorneys' fees, whereas in the Federal courts attorneys' fees are not considered an element of damages on an injunction bond. Since that is the law of Federal courts, and since the law of that court enters into and forms a part of the contract of a bond given in such court, it necessarily follows that any condition in that bond for the payment of damages did not contemplate the payment of attorneys fees which by the law of that court was not considered an element of damage at all. If there is any meaning in the authorities cited, then there is no logical theory upon which to say that this defendant or its sureties entered into the contract embodied in the bond intending or expecting that it in any manner obligated them to pay as damages something which the very court, in response to whose order the bond was given, declared was not an element of damages in such case. Upon what theory then can it be said that, when the law and the rules of practice in the Federal court provide for the taxation of certain attorneys fees to be paid as costs in the case, and repudiate the right of anyone to consider attorneys fees as an element of damages on an injunction bond, the makers of such bond obligated themselves to pay the attorneys fees as damages upon the bond, or that a bond made under such circumstances would give the obligee the right to go into some other court and recover as damages those attorneys fees in

violation of the law which entered into and became a part of this contract at the time the bond was made. On the trial below the plaintiff relied upon the case of Wash *v.* Lackland, 8 M. A. 122, as authority for including attorneys fees in such case. It is undoubtedly the fact that in that case the St. Louis Court of Appeals did decide that although the bond there sued on was given in a Federal court, there could be a recovery of attorneys fees as damages in accordance with the practice prevailing as to bonds given in Missouri, but I submit that an examination of that case will disclose a lack of any satisfactory reasoning leading to that conclusion. The court wholly ignored the nature of the obligation of an injunction bond: that it was a part of a proceeding in the particular court in which it was given; that the law governing the court in which it was given is to be considered as incorporated in and as a part of the bond, etc.

The unsoundness of the reasoning of that case will be disclosed by a consideration of the following clause: —

> "There was no stipulation in the bond that it should be sued on in a Federal court. While it is but natural and proper to suppose that the Federal tribunals would adhere to their former rulings, there is yet no guaranty to that effect in the contract. We therefore fail to perceive that the makers intended to create only such obligations as attach under the Federal jurisprudence. The interpretation of a contract belongs to the court before which it is pending."

In the first place, it is wholly immaterial in what court the bond may be sued on, yet this seems to be made a decisive question by the St. Louis Court of Appeals in the above opinion. The real question is where was the bond made? The significance of any stipulations in a bond

is determined by the circumstances surrounding the making of it, and not those present at the time of suing upon it. For instance, in the case of Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503, an injunction bond given in the State of Arkansas was sued on in the State of Tennessee, and the court of the latter State held that the Arkansas statute would control, although the court said that the statute really only affected the remedy; and again in the case of Mix *v.* Vail, 86 Ill. 40, and in Murfree on Official Bonds, Sec. 389, it is held that injunction bonds cannot be affecetd by laws passed subsequent to their execution. This seems to be too elementary to require further citation of authorities, and since this and other courts have decided that in effect the rules of practice in equity have an equivalent force to statutes governing the practice in such cases, and since as to such questions the relation of the Federal and State courts is similar to that existing between the courts of different States, the only logical conclusion is that the laws and rules of practice in force at the time in the jurisdiction when and where the bond was given are the essential things which are to control, and not the fact that the bond may be sued on in one court or another, and therefore the language already quoted from the St. Louis Court of Appeals shows a disregard of the real principles, and that the matters which the court there suggested as reasons for its conclusion were wholly insufficient. In other words, it is immaterial whether there was a stipulation that the bond should be sued on in a Federal court or not, because not the place where the suit was brought, but the law of the place where the bond was made measured the liability. Nor is it material whether there was any subsequent change in the rulings of the Federal court or for that matter any change in the statutes of the State, because it is not any subsequent changes of the law, whether it rest in statute or in decision, that are to control, but the rule of law existing at the time

the bond was made. The St. Louis Court of Appeals said that the interpretation of the contract belongs to the court before which it is pending. Undoubtedly that is true, but it is very evident that the court in that case made a serious mistake in undertaking to interpret the contract as though it had been made in a State court instead of a Federal court. While the court where the suit was brought must interpret the contract, yet it must interpret it according to established rules, one of the fundamental ones being that a contract is to be governed by the law of the place where it is entered into. As already stated, there is as much distinction between the jurisdiction of a Federal and a State court as there is between the courts of two States. The contract should have been interpreted, therefore, according to the circumstances as governed by the law of the Federal court where the bond was made, and not according to the law of the State court where it was sued upon, which under no circumstances could have entered into the minds of the parties at the time the contract was made. It would be equally logical with anything suggested by the St. Louis Court of Appeals if we should now inquire: Was there any stipulation or assurance that this bond would be sued upon in the State court, so that it might be interpreted as the court did interpret it? It will be seen at once that the reasoning of that court resolves the case into a contract which has a variable signification. If it is sued upon in a Federal court, it is interpreted as though the parties expressly stipulated that they would not pay any attorneys' fees by way of damages, while if the same bond is sued upon in a State court it is to be interpreted as meaning that the parties expressly stipulated that they would pay such attorneys' fees by way of damages. Courts may differ in construing the same contract, but the parties mean only one thing, and one court or the other makes a mistake if they do not agree as to what the

contract means. It is manifest that a decision is erroneous which intentionally and necessarily puts a contract in the position of being susceptible of one meaning in one court and of a different meaning in another court. The mistake that the St. Louis Court of Appeals made in that case was that it disregarded a fundamental law of contracts. It disregarded the intention of the parties. It disregarded the law governing contracts at the place where that bond was made, and, by subsequently injecting other conditions and different rules of law into the contract at the time the suit was brought upon it, it reached a wrong conclusion. The decision seems to rest not so much in the reasoning of the court itself, as in this statement: —

> "It is settled in Missouri that attorneys' fees paid in defense of an injunction suit may be recovered as damages in an action on the injunction bond, and this although the bond was given and the injunction obtained in a Federal court."

And then follows the citation of several cases to which we ask the attention of the court in order to show that they absolutely furnish no authority for the statement made by the St. Louis Court of Appeals. Only one of them, R. R. *v.* Shepley, 1 M. A. 254, at all touches upon the question. In that case the decision was based upon the statement that "a bond of this kind is to be governed by the rules that govern the interpretation of any other contract. If the obligor when executing it, knew that under a ruling of the Supreme Court of the United States, he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the Supreme Court of the State of Missouri upon the same obligation in a similar proceeding he would be held for counsel fees in case of failure to maintain his injunction."

This, as it will be seen, ignores the occasion of the making of an injunction bond and all the rules of law entering into the same. What has been said in regard to the former case may be repeated here, and nothing is added to the logic of these cases by citing the one in support of the other.

As to the other cases cited in Wash *v.* Lackland, it is only necessary to make the following reference to them: —

State ex rel. *v.* Beldsmeier, 56 Mo. 226, was an action on an attachment bond and only held that a party might sue on the bond without having filed a plea in abatement.

Barnes *v.* Webster, 16 Mo. 258, was a suit on a bond given in an attachment suit, conditioned to pay all damages that might accrue, — held suit could be maintained to use of a garnishee, and though the bond was not authorized by any statute it was good as a common law bond, and though made to the United States instead of defendant, he could maintain suit by United States to his use.

Leisse *v.* R. R., 2 M. A. 105, does not in any manner involve any question concerning an injunction or a bond given in a Federal court. It was an action to recover damages for the institution of proceedings to condemn private property, and it was held not necessary to have actually paid out money for expenses incurred.

The defendant in error here, as respondent in the Kansas City Court of Appeals, also cited in his brief, and the Court of Appeals in its opinion relied upon the following cases: —

Mitchell *v.* Hawley, 79 California, 301;
Aiken *v.* Leathers, 40 La. An. 23.

Concerning the above case from California it may be said that it is subject to the same criticism as the case of Walsh *v.* Lackland, 8 M. A. 122. It wholly ignores the

proposition that the law governing in the jurisdiction in which a contract is made is supposed to enter into and become a part of it, and makes the construction of a contract depend upon the law in force in the jurisdiction where it may be sued upon, thus giving to the contract and to the intention of the parties in making it a variable meaning and effect, according to the place where suit may be brought upon it. It will farther be noted of this case that the statement of the view of the court is not very positive, being as follows: "We cannot agree with counsel in the view that in an action brought in a court in this State on an injunction bond given in a court of the United States, counsel fees can in no instance be recovered as damages, because such damages are not allowed by the Federal courts," while at the same time the court refused to allow attorneys' fees in that case, and remanded the case with instructions to the lower court to modify its judgment by striking out the amount awarded as attorneys' fees; in all other respects the judgment was affirmed.

The case of Aiken v. Leathers, from Louisiana, did not in fact undertake to decide that the rule governing the measure of damages in the Federal courts should not control, but upon a misconception of what this court decided in the case of Meyers *v.* Block, 120 U. S. 206, assumed that there had been a modification of the rule concerning the recovery of attorneys' fees on injunction bonds given in the United States courts, or at least that there was a conflict in the decisions of this court upon that subject, and then held that in view of that circumstance it would permit a recovery of attorneys' fees under such circumstances, at the same time admitting that there might be error in such judgment, which will be a point to be noticed later on in our reference to cases affirmatively establishing the presence of a Federal question, where the question of attorneys' fees is involved.

In the series of cases decided in this court, known as the "Removal Cases," and reported in 115 U. S. 1, this court held that cases against corporations created by the laws of the United States arose under such laws so as to authorize a removal to the Federal courts.

That decision was based largely upon the ruling of this court in the case of Osborn *v.* Bank of United States, 9 Wheat. 817, in the course of which opinion Chief Justice Marshall remarked: —

> "When that bank sues, the first question which presents itself, and which lies at the foundation of the case, is, has this legal entity a right to sue? Has it a right to come not into this court particularly, but into any court? This depends upon a law of the United States. The next question is: Has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The question forms an original ingredient in every case. Whether it in fact be relied on or not in the defense it is still a part of the cause, and may be relied on. The questions which the case involves then must determine its character, whether those questions be made in the cause or not."

Applying this language to the case at bar we may say that when suit is brought upon the injunction bond the question which lies at the foundation of the cause, is, By what authority was this bond given? And that is a question that depends upon the power and the authority and rules of practice of the United States court. The next question is, what is the extent of liability, and what is the measure

of damage upon the contract evidenced by this bond? And that, too, is a question which depends upon the law and the rules of practice governing the United States court.

It has been decided that a suit upon the official bond of the cashier of a national bank involves a Federal question.

Walker *v.* Bank, 56 Fed. 76.

It has also been decided that an action against a marshal for goods seized by him under attachment from a United States court is one arising under the authority of the United States.

Bock *v.* Perkins, 139 U. S. 628;
Feibelman *v.* Packard, 109 U. S. 421.

And where a defendant in trespass justifies under authority of a court of the United States there is a Federal question involved.

Houser *v.* Clayton, 3 Woods, 273.

A suit to set aside a sale made under a decree of a Federal court involves an authority under the United States and presents a Federal question.

Johnson *v.* Banking Assn., 33 La. Ann. 479.

In Crescent Live Stock Co. *v.* Butchers Union, 120 U. S. 141–146, it was held that the question whether a State court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process. This was said in a case upon writ of error to the Supreme Court of the State of Louisiana.

In the case at bar, the practical question is: Has the

State court given due effect to the order of the United States court in requiring and approving the injunction bond given in the suit in equity pending in that court? Without farther specifying, the following cases may be cited as authority upon the proposition that the case at bar involved a Federal question: —

Wood *v.* Drake, 70 Fed. 881;
Johnson *v.* Christian, 125 U. S. 642;
Lacassagne *v.* Chapuis, 144 U. S. 119;
R. R. *v.* Briscoe, 144 U. S. 133;
R. R. *v.* Amato, 144 U. S. 465;
R. R. *v.* Cox, 145 U. S. 593;
Carey *v.* R. R., 161 U. S. 115;
R. R. *v.* Haber, 169 U. S. 613–622.

This last case bears especially upon the point that when the contention is made that a Federal or constitutional question is presented, and the ruling upon that would be decisive of the case one way or the other, then such question is so involved in the case as to require its consideration, and as to confer jurisdiction upon the courts which are authorized to pass upon such questions.

The above cases are more or less general in their character and application to the question under consideration. We fortunately are not without cases bearing directly upon the particular question of injunction bonds to serve as a guide in determining the question now before us.

We have a specific and positive statement of the law applicable to such cases from Chief Justice Taney in the case of Bein *v.* Heath, 12 How. 168, in which he said, among other things: —

> "*Now, there is manifest error in subjecting the parties to an injunction bond given in a proceeding in a court of the United States to the laws of the State.*

The proceeding in the Circuit Court of the United States in equity is regulated by the laws of Congress and the rules of this court made under authority of an act of Congress. And the 90th rule declares that when not otherwise directed the practice of the High Court of Chancery in England shall be followed. The 8th rule authorizes the Circuit Courts, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law defining the rights and obligations of parties to an injunction bond nor do we suppose any such rule has been adopted by the court, and if it has it is unauthorized by law, and cannot regulate the rights or obligations of the parties. * * * And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contra-distinguished from a court of common law. And they require a bond or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court. *In such proceeding upon such a bond the court would have no authority to apply to it the legislative provisions of the State.* The obligors would be answerable for any damages or costs which the adverse party sustained by reason of the injunction from

> the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, not for the debt itself unless it was lost by the delay, *nor for the fees paid to the counsel for conducting the suit.*"

There never has been any question of that statement of the law at any time nor in any case, and it is a direct authority that the case at bar involves a Federal question.

The Court of Appeals, in order to fortify its position, which was contrary to the rule as announced by Chief Justice Taney, cited certain cases as authority upon the proposition that the measure of liability upon an injunction bond given in a Federal court would be different if the bond was sued upon in a State court from what it would be if sued upon in a Federal court. Waiving any farther discussion of a proposition which seems to bear in its statement its own refutation, when it asserts that the same contract means one thing in one court and another thing in another court, it is only necessary to turn to the very cases cited by the Court of Appeals to establish the proposition we are now contending for, namely, that the case involved a Federal question, and therefore the judgment of the Kansas City Court of Appeals must be reversed. Regardless of any criticisms that may be made upon the reasoning of these cases; regardless of the fact that, notwithstanding what the Court of Appeals quotes from the California case, still that court refused to allow the attorney's fees as an element of damages, I ask this court to note that in the case of Aiken *v.* Leathers, 40 La. Ann. 23, cited by the Court of Appeals, the court did not attempt to hold that the rule of liability in the Federal courts should not control, but on the contrary attempted to show the fallacy of this court in its decision in the case of Oelrichs *v.* Spain, 15 Wall. 211, and then the Louisiana court sought

to apply to the case what it conceived was the rule which the Federal courts *ought* to adopt as the measure of damages, at the same time ignoring the fact that in Bein *v.* Heath, *supra*, and in Myers *v.* Block, 120 U. S. 206, this court had asserted that attorneys' fees were not a proper element of damages. The argument made by the Louisiana court necessarily asserted the proposition which we now contend for, that is that a suit upon an injunction bond given in the Federal court involved a Federal question, and involved an authority under the United States, and the court in terms stated this view, because, after having stated its conclusions, and having condemned the views of this court, in Oelrichs *v.* Spain the Louisiana court said: —

> "We feel relieved from judicial responsibility for any error of judgment which we may commit in reaching this conclusion by the thought that it lies within the power of defendants to obtain a correction of such error at the hands of the exalted tribunal whose decision on the point would be our guide for the future."

That means that this court could review the decision then being made, by a writ of error, while every one knows that a writ of error would not lie from this court to the Supreme Court of Louisiana unless either the Constitution or some law of, or some authority under the United States was involved.

But, again, the case principally relied upon by the Court of Appeals in its decision, and as the means by which it evaded the force of the decision of Chief Justice Taney above mentioned, is the case of Myers *v.* Block, 120 U. S. 206. That case unquestionably did undertake to distinguish the case of Bein *v.* Heath in one particular, and in that particular reached a different conclusion, upon the

question of the right to recover upon an injunction bond without a previous adjudication of the damages, but with that we are not concerned at this time. That case in no manner modified the decision of the court in Bein *v.* Heath, upon the question that the law of the Federal court, and not the law of the State measured the liability upon an injunction bond given in a United States court. Myers *v.* Block was before this court on a writ of error to the Supreme Court of the State of Louisiana. All we can learn from the report of that case is that there was an ordinary action at law in a State court on an injunction bond given in a United States court.

The point to which I now invite attention in this case of Myers *v.* Block, is that it is an authority supporting the proposition that a suit upon an injunction bond given in a Federal court involves a Federal question so as to give this court jurisdiction over the case by writ of error to the Supreme Court of the State. The question is not discussed at length. It seems to be assumed as too plain to require argument, but that it is fairly and specifically in the case, and that the jurisdiction of this court in that case depended upon that question alone, and that, unless the view of the court was as we now contend, it could not have had jurisdiction at all, is apparent from an examination of the case. In the preliminary statement on page 206 is this sentence: "The facts which make the Federal question are stated in the opinion of the court." In the opinion of the court we find on page 209 a statement of the errors assigned, consisting of four points, the first being: "The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana when they were parties to an injunction bond given in equity and in and by order of the Federal court." The other three points have no possible bearing upon the question of jurisdiction. It does not appear that there was any

controversy over the question of jurisdiction, but the only ground upon which the court could have retained jurisdiction of that case was that it involved a Federal question, and the only Federal question was that suggested by the first assignment of error, which involves the proposition contended for in the case at bar, namely, that the obligors in an injunction bond given in an equity suit in a United States court have a right to claim an immunity against a liability for attorneys fees by reason of the rules of practice and the law governing in proceedings in Federal courts, and that the authority of the United States exercised by the Federal courts is drawn in question in any suit upon a bond given in pursuance of an order and under the direction of a Federal court. Upon this state of case the court proceeded to review the decision of the Supreme Court of Louisiana, which it sustained, but manifestly, unless it had jurisdiction over the case, it would not have considered that opinion at all. It would have dismissed the writ of error, and therefore I say that it is a direct authority to sustain our contention as to the character of the case, and consequently determining the question of jurisdiction of this court on the theory of a Federal question being *necessarily* involved in an action on an injunction given in a case in a Circuit Court of the United States.

The question has been very directly passed upon by the United States Circuit Court of Appeals for the Sixth Circuit in the case of Le[illegible] Brown, 90 Fed. 171. There an action at law was brought in the United States Circuit Court for the District of Kentucky without any claim of diverse citizenship between the parties, the jurisdiction being grounded upon the proposition that the suit was to recover damages upon an injunction bond previously given in a Federal court. The jurisdiction of the court having been questioned, Judge Taft, in disposing of the case, said: "We have no doubt that an action at law in a Federa

court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the Constitution and laws of the United States." When a suit is brought in a State court, whether the amount be more or less than necessary to confer jurisdiction upon a Federal court, certainly the plaintiff must be enforcing rights secured to him under the Constitution and laws of the United States, and with equal truth may it be said that the defendant who seeks to limit his liability to the measure of damages recognized and allowed by the Federal court, under whose order and approval the bond was given, is enforcing and invoking rights, privileges and immunities arising under the laws of the United States, and draws in question authority exercised under the United States.

The cases already cited clearly establish that an authority under the United States was drawn in question in this case; that an action on the bond here sued on necessarily involves the law of the United States as declared by her courts concerning the measure of liability on an injunction bond given in a proceeding in such court, and that a defense that attorneys fees cannot be recovered on such bond invokes a right and an immunity under the law and authority of the United States, and that brings us to the next proposition.

IV.

Was the claim of a right or an immunity under the Federal law presented in such manner or was an authority under the United States so drawn in question, as to justify the issuing of a writ of error to the Kansas City Court of Appeals?

Referring again to the proceedings in the Circuit Court of Cooper County: If these pleadings and these instructions do not present the claim of a right or immunity under

the law governing the practice in the Federal courts, and do not claim the right to restrict the liability upon the injunction bond given in the United States court, in accordance with the rules of law and practice governing such courts, then I say candidly such question was not raised in the Circuit Court. In that connection, I want to say, however, that under the State practice permitting pleading by general denial, and raising defenses thereunder consisting of any specific matter which tends to defeat the right of recovery, it was not necessary, and not to be expected, that the defendant in that case would specially plead the rule of liability applicable to bonds given in Federal courts and specifically denominate it as a Federal right or a defense under a Federal immunity. It would have been denounced as bad pleading if it had been done. In the same way, under declarations I and II, asked by the defendant in that case, it may be said that the practice in the State justifies the presenting, in these general instructions or declarations, any proposition of law which overcomes the plaintiff's case and destroys his right of recovery, and therefore it was not necessary, and not to be expected, that the defendant, in asking the declarations of law would have specifically mentioned the different propositions relied upon. Perhaps we are unfortunate that the practice in the State is as it is. That these pleadings and these instructions were regarded as sufficient to raise the specific question of the right to defeat a recovery for attorneys fees upon this bond, because the law governing the Federal courts is that no such damages can be recovered, is beyond question, for it was argued at length upon both sides in the Circuit Court upon substantially the same authorities that were afterwards presented in the Court of Appeals. But it is not necessary that the Federal question or the Federal right should have been so specifically asserted and claimed in the

trial court. It is sufficient if it is clearly asserted and distinctly claimed when the case is first presented to the appellate court. This necessarily follows from those cases which decide that this court will not review the judgment of a State court when the Federal question is first presented in a motion for rehearing. That necessarily means that it is sufficient if the Federal question is presented on the original hearing of the case in the appellate court; otherwise the ruling would be that the judgment will not be reviewed unless the question was presented with the particularity required in the lower court. I do not mean by this statement to admit that the Federal question and the Federal right were not sufficiently presented in the lower court, but we may consider that in connection with the assertion of the claim in the Court of Appeals. Recurring now to the points and authorities, and the argument in support of the same, as set forth in the accompanying printed brief, which, together with the opinion of the court is the only means we have of ascertaining what questions were presented to the Court of Appeals for its decision, I submit that there ought to be no question but that the present plaintiff in error, the railway company, invoked as a defense in that case the rule of liability arising out of the law governing the Federal courts and also invoked the immunity from liability for attorneys fees, because in exercising the authority of the United States the Federal courts exclude attorneys fees from the damages that may be recovered upon injunction bonds required by and given in such courts. Note, if your Honors please, Points I, II and III of appellant's brief in the Court of Appeals (Record, pp. 42 and 43), to the following effect: —

First, the right of recovery depends entirely upon the bond.

Second, the law in force at the time the bond is made, at the place and in the court where it is given, is to be con-

sidered as incorporated in and as a part of the contract evidenced by the bond; that where there is no statute prescribing the conditions of the bond they are determined by the rules of court and the discretion of the chancellor before whom it is given, and the bond is a part of the record in the case and of the court in which it is given, and therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case, and

Third, the terms and conditions of the bond sued on must be construed under and determined by either the rules and practice of the Federal courts or by the statute and decisions of Missouri, and on either theory the lower court had erred in rendering judgment for the plaintiff, since viewed as a bond subject to the rules and practice of the Federal courts the judgment was erroneous, because the principal damage allowed was attorneys fees, which are not considered an element of damages on an injunction bond in a Federal court.

There were other questions in the case, namely, that no damages had been adjudged upon the dissolution of the injunction, and therefore under the terms of the bond there could be no recovery until damages had been adjudged, and farther, that in any event whether the case was to be governed by the Federal law or the State law, there should be no recovery of attorneys fees, because the injunction in this case was a mere incident to other purposes which were the principal ones in the case. It is manifest, however, that these other defenses cannot destroy the right to a review upon the Federal question suggested. No matter how the court might rule upon the question of the necessity of a previous assessment of damages; no matter how it might rule upon the question of the injunction being a mere incident to some other as the principal purpose of the equity suit, still the limit of liability imposed by the law

governing Federal courts which excludes attorneys fees as an element of damages would supersede these other questions and preclude a recovery. Therefore the question of the effect of the Federal law upon the right of recovery was such as to destroy it, regardless of the ruling upon any other question, and when the court decided adversely to the contention of the defendant it necessarily decided against a right and an immunity claimed under the Federal law, and decided that question in such a way that the vice of its decision could not have been overcome by its ruling upon any other question that was presented in the case.

Before considering farther just what was done in the case at bar, it may be well to notice the decisions of this court concerning what is a sufficient assertion of a Federal right or question.

In C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226, which was in error to the Supreme Court of Illinois, there was a motion to dismiss for want of jurisdiction, which was overruled, and the jurisdiction of the court sustained. That was a condemnation proceeding, and there was no answer setting up any defense or asserting any right or immunity. The point was made in the motion for new trial that the rulings of the court in excluding evidence were contrary to the Fourteenth Amendment of the Federal Constitution, and in the assignment of errors filed in the Supreme Court of Illinois the same complaint was made.

In disposing of that case the court said: —

> "It is not, therefore, important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that such right was set up or specially claimed in the State court in such manner as to bring it to the attention of that court."

And farther: —

"It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States, but that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant, for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule,' this court said in Proprietors, etc. *v.* Land & Imp. Co., 68 U. S., 1 Wall. 116–143, 'is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In Roby *v.* Colehauer, 146 U. S. 153–159, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed. It must appear from the record of the case either that the right so set up and claimed was expressly denied or that such was the necessary effect in law of the judgment.' DeSaussure *v.* Gaillard, 127 U. S. 216–234; Brown *v.* Atwell, 92 U. S. 327; Insurance Co. *v.* Needles, 113 U. S. 574–677; Sayward *v.* Denny, 158 U. S. 180–183. There is, we conceive, no room to doubt that the legal effect of the judgment

below was to declare that the rights asserted by the defendant under the national Constitution were not infringed by the proceedings in the case, consequently the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

In Oxley Stave Co. *v.* Butler County, in error to the Supreme Court of Missouri, the writ of error was dismissed, but the court stated the correct rule as follows:—

"This court may re-examine the final judgment of the highest court of a State when the validity of a treaty or a statute of or authority exercised under the United States is 'drawn in question,' and the decision is against its validity, or when the validity of a statute or an authority exercised under any statute is 'drawn in question' on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment even if it denied some title, right, privilege or immunity of the unsuccessful party unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the State court as belonging to such party under the Constitution, or some treaty, statute, commission or authority of the United States. Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States, nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed of the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted. For aught that appears, the State court proceeded in its determi-

nation of the cause without any thought that it was expected to decide a Federal question. The Supreme Court of Missouri properly said that only two questions were presented by the record for its determination." (Then follows a statement of the questions submitted for decision, clearly showing that there was no assertion of any right or immunity under the Constitution or law, or any authority of the United States.)

The court then proceeded to consider the meaning of the words "specially set up or claimed," with the result that it stated that "specially" as there used means "unmistakably," and that the statutory requirement is not met if the declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. The alternative expression "set up or claimed" would indicate that the right might be asserted by some special pleading, or by claiming it by unmistakably urging it upon the court as a ground for relief by way of defense or otherwise. It should be noted that in the Oxley case the only claim of the presence of a Federal question was based upon the fact that the decree complained of was passed against deceased persons, from which it was argued that it was in violation of the Fourteenth Amendment to the Constitution of the United States, although there was no reference to the Constitution at any stage of the proceeding in the State court.

After examining various authorities, the court concluded the opinion as follows: —

"Without further references to adjudged cases, we are of the opinion that the general allegation or claim, in different forms, that the decree of the Butler County Circuit Court was passed against some persons who

were at the time dead and against others who were necessary parties, but who had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat., Sec. 709, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States forbidding a State to deprive any person of his property without due process of law. *If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity and denied the claim so asserted, our jurisdiction could be sustained, but it does not so appear.*"

While the Oxley case is in strict harmony with the other decisions of this court, it perhaps states the rule as clearly and as strongly against the jurisdiction as any other case, and yet I feel confident that upon the authority of that case this court ought to entertain jurisdiction in the case at bar.

I repeat the quotation formerly made from the case of R. R. *v.* Haber, 169 U. S. 613, as follows: —

"The *answer* of the railway company as well as its *requests for instructions*, and the *opinion of the Supreme Court* of the State, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the animal industry act, furnished a complete defense to all claims for damages asserted in this action. That contention was overruled by the trial court, as well as by the Supreme Court of the State. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other

words, the State court could not properly have disposed of the case without deciding the Federal question raised by the company. This court, therefore, has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior gave to the railway company the right, privilege, and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled."

As was there suggested, that case also involved a statute of the State of Kansas. At the same time it will be noticed from the above extract that the court there treated the Federal question as depending upon the immunity or the right invoked under a law of Congress, and certain regulations prescribed by the Secretary of Agriculture as furnishing a complete defense to the claim for damages asserted in the action against the railroad company. As I understand the case, the jurisdiction was not sustained because of the peculiar form in which the defense may have been alleged in the answer, as specially invoking the immunity or right referred to, but because it was apparent upon the whole record that if the contention of the railway company had been sustained the verdict and judgment must have been in its favor, and that the State court could not properly have disposed of the case without deciding the Federal question raised by the company, and the jurisdiction was sustained, although the court afterwards held that the State court had properly decided upon the defense claimed by the railway company.

In the case of Kipley *v.* Illinois, ex rel., 170 U. S. 182, which was in error to the Supreme Court of Illinois, the writ was on motion dismissed, because a Federal question

was not properly presented. The ground upon which the claim was made was an allegation in the answer to the effect that a certain statute of Illinois was unconstitutional and void, and this the court held must be taken as intended to apply to the Constitution of the State, and not to the Constitution of the United States.

In disposing of the case the court said: —

> "The answer makes no reference whatever to the Constitution or the laws of the United States. It is true that it avers that the Illinois Civil Service Act was unconstitutional and void (that is, as elsewhere suggested, under the State Constitution) but when the jurisdiction of this court is invoked for the protection against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment from the record that such right, title, privilege or immunity was specially set up or claimed under such Constitution or laws. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here intended to assert a Federal right."

In R. R. *v.* Homestead Co., 123 U. S. 552, in error to the Supreme Court of Iowa, the jurisdiction of the court was sustained. In that case the defense relied upon in the lower court was a certain decree which was pleaded in bar of the then present action. To that the plaintiff replied that the decree or judgment was void, because the United States court rendering it had no jurisdiction. There were also other defenses set up. There were two cases which were very similar, — a fact necessary to be

considered in order to understand the language of the opinion. When the cases reached the Supreme Court of Iowa the point was not mentioned in the printed brief filed in one of the cases. One oral argument was made for both cases, and from the matter so presented, and notwithstanding a rule of the Supreme Court of the State that nothing would be considered except what was presented in the printed briefs and arguments, this court sustained the jurisdiction, saying: —

> "The record in that (the companion) case taken in connection with that in this shows that the answer setting up the former adjudication, the reply thereto, and the assignment of errors on this point were the same in both cases. They differed in their facts only in that Mrs. Litchfield was not actually a party to the former suit upon the face of the record, and Navigation and Railroad Company was.
>
> "We cannot look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question fairly presented by the pleadings, proofs and assignments of error and necessarily involved in the determination of the case. *That question stood at the very front of the litigation*, and if decided in favor of the Navigation and Railroad Company ended the whole matter. To give a judgment the other way without considering it was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion. * * * As it was *the* defense in this case, and if sustained made it unnecessary to consider anything else, we cannot decide that the court was justified in holding that it could not be determined. Such action was in our opinion equivalent to

> a decision against the Federal right which was actually set up and claimed, and thus our jurisdiction for the review of the judgment on this question as well as the others is complete."

It will be noticed that the court there said that there was a controlling Federal question fairly presented by the pleadings, proofs and assignments of error, and necessarily involved in the determination of the case, although the only manner in which such question was presented was by the defendant pleading a decree of the United States court in bar of the plaintiff's action, and the plaintiff by reply denying the legal effect of such decree because the United States Court had no jurisdiction. Certainly the allegations in the case at bar, as clearly, as unmistakably, and as specially assert and invoke the immunity from liability for attorneys' fees under the law governing Federal courts, as was the Federal right invoked in the case just referred to.

This court farther said in that case: —

> "It seems from the opinion, which as part of the record we must take notice of, that this case was argued in connection with that of the Administrator of Mrs. Litchfield. * * * In the oral argument, there being but one for the two cases, this point was raised and discussed; but in the printed briefs it was referred to only in that entitled in the suit of the administrator of Mrs. Litchfield."

I mention this to show that in that case the court relied practically altogether upon the opinion of the Supreme Court of the State, which is a matter I will refer to a little later on.

In the case of Bridge Proprietors *v.* Land and Improvement Co., 1 Wall, 116, in error to the Court of

Errors and Appeals of the State of New Jersey, the court sustained its jurisdiction over the case, although there was no specific reference to or claim of any Federal right or immunity. One company claimed an exclusive right under a certain statute. Another claimed a similar right under a subsequent statute, which subsequent statute was in turn attacked as impairing the contractual rights arising under the first statute. This from the report appears to have been all that the record disclosed, but when the jurisdiction of this court was assailed plaintiff in error contended that under the pleadings in the case the validity of the latter act mentioned was drawn in question, as being contrary to the provision of the United States Constituton declaring that no State shall pass any law impairing the obligation of a contract. On the other hand, it was objected that the pleadings did not in words say that the statute was void because it conflicted with the Constitution, and did not refer to any special clause of the Constitution. Mr. Justice Miller, stating the opinion of the court, first asserted that the court must take judicial notice of the Constitution of the United States without its being specially pleaded, and if the parties in their pleading make a case which necessarily comes within some provision of that instrument the court must recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case." The same may fairly be said concerning the laws of the United States and the rules and the practice governing proceedings in the Federal courts, and the rights arising thereunder, and when the pleadings of the case clearly show that the controversy between the parties, including both the right of the plaintiff to recover if at all, and the right of the defendant to resist the recovery arises out of an authority exercised under the United States, by a court of the United States, and involves the true construction of the rights, lia-

bilities and immunities given and prescribed by the law governing such court, then clearly this court should take notice of that without its being specially stated in terms that "this right is a Federal right," or "this defense is invoking a Federal immunity." Proceeding in that case, Mr. Justice Miller approvingly quoted the rules laid down by Mr. Justice Story in the case of Crowell *v.* Randell, 10 Pet. 368, as to what was necessary to bring the case within the 25th Section of the Judiciary Act, as follows:—

> "1st. That some one of the questions stated in that section did arise in the State court.
>
> "2d. That the question was decided by the State court as required in the same section.
>
> "3d. That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment.
>
> "4th. That it is not sufficient to show that the question might have arisen or been applicable to the case unless it is further shown in the record that it did arise and was applied by the State court to the case."

He farther referred to the ruling of Judge Catron in the case of Armstrong *v.* Treas. of Athens Co., 16 Pet. 281, and approvingly said:—

> "Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he lays down six different modes in which that may be done. The first of these is 'either

by express averment or by necessary intendment from the pleadings in the case.' The sixth is 'that it must appear from the record that the question was necessarily involved in the decesion, and that the State court could not have given the judgment or decree which they passed without deciding it.' Now although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress or part of the Constitution supposed to be infringed by the State law ought to be pointed out, it has never been held that this should be done in express words, but the true and rational rule is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Again, in the case of Furman *v.* Nichol, 8 Wall. 44, in error to the Supreme Court of Tennessee, the jurisdiction of the court was sustained against the contention that the Federal right was not specifically claimed in the State court.

Mr. Justice Davis, delivering the opinion of the court, said: —

"It is enough for the purposes of this suit to say that a cause can be removed from a State court to this court under the 25th section of the Judiciary Act of 1789 whenever some one of the questions expressed in it is relied on by the party who brings the case here, and when the right he claims it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution which the plaintiffs in error say has been violated in its application to

their case should be contained in the pleadings, but this is in no case necessary. If the record shows either by express averment or by clear and necessary intendment that the constitutional provision did arise, and that the Court below could not have reached the conclusion and judgment which it did reach without applying it to the case in hand, then the jurisdiction of this court attaches, and it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction if the question was in the case, was decided adversely to the plaintiffs in error, and the court was induced by it to make the judgment which it did."

These citations are sufficient, I think, to enable me to present my reasons for contending that in the case at bar we have brought ourselves fully within the rulings of this court, and that under such rulings the writ of error properly issued and the court should entertain jurisdiction of the case, and reverse the judgment of the Kansas City Court of Appeals.

It is true that some of the cases referred to involved the validity of State statutes, while some of them did not, but certainly a question is as much a Federal question if it arises from invoking protection or immunity under authority of the United States as it is if it arises from an attack upon a statute of a State, and it does not seem that any more formality or particularity in stating the claim should be made in the former case than in the latter. In fact, if there is any difference, it would seem from the nature of the different controversies that greater particularity should be required in the case of an attack upon a statute of a State. It may well be said that a general charge of invalidity of a State statute or a general attack that it was unconstitutional, is insufficient, because it may be true that the law

attacked is invalid because of some provision of the State Constitution as well as that it may be void because it violates some provision of the Federal Constitution. Therefore, particularity of statement may be required to show clearly that the party was relying upon a violation of the Federal Constitution, so that it might unmistakably appear that he was claiming a violation of a Federal right, whereas in a case where the party is asserting or seeking immunity under some provision of a Federal law or through some authority under the United States, there can be no question about the reliance being upon the Federal law or authority, and whatever is sufficient to show that reliance is placed upon a law or authority of the United States unmistakably shows a claim based upon the law or authority of the United States, and therefore necessarily raises a Federal question. I submit that if it once appears that dependence is being placed upon a law or authority of the United States, — if such law or authority is at all invoked as a defense in a case, — it necessarily involves the effect of such law or authority of the United States, and thereby presents a Federal question, and whatever does do this much ought, I submit, to be held as sufficient to raise the question which thus becomes necessary to a determination of the case, without the necessity of designating it in terms as the assertion of a Federal right or immunity.

I think the cases already referred to establish the proposition that what is essential to the jurisdiction of the Supreme Court in a writ of error to the highest court of a State is that the Federal question relied upon must have been brought to the attention of the highest court of the State that could pass upon the case, in such a manner as to inform that court that it was called upon to decide that question, and that it did decide it either in express terms or by necessary implication in its judgment, that no particular form of asserting such claim is necessary so long as

it unmistakably appears that the question was presented for determination, and that no matter how vague may be the form and manner in which the question is presented, if the State court did understand that it was presented, and the decision upon the question was necessary to the final judgment in the case, that is sufficient. I think this is a just conclusion to be reached from the opinion of this court in the case of Oxley Stave Co. *v.* Butler Co., 166 U. S. 648, when that court after denouncing as insufficient the general terms by which it was claimed the Federal question was presented, said: —

> "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained, but it does not so appear."

Likewise, in the case of C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226, the court said: —

> "It is sufficient if it appears from the record that such right was set up or specially claimed in the State court in such manner as to bring it to the attention of that court."

From others of the cases, as Your Honors will discover from reading them, it is sufficient if it appears from necessary intendment that the question was presented, or if the right or immunity under the law or authority of the United States is so involved in the case itself that it could not be decided without the court passing upon such law or authority.

I therefore submit that upon the strength of these authorities it is a fair deduction to say that in a

suit wherein the petition alleged the pendency of an action at law, in a Federal court; the giving of an injunction bond in a suit in equity in the same court, to restrain such action at law; the dissolution of the injunction; and the claim of a right to recover damages consisting of attorneys fees upon such bond; and wherein the answer admitted the giving of the bond under such circumstances; and alleged that the equity suit in which the injunction was granted was necessary to enable the defendant to make its defense in the United States court to the action at law mentioned in the petition, and denied every other allegation in the petition, including the right to recover damages of the kind specified, — then the law which fixes the measure of recovery is necessarily involved in that case, and if the rule which is to so fix the measure of the liability upon such bond is the law of the United States courts, if it arises out of the rules governing the practice in such courts, or arises under the authority of the United States exercised through such Federal court, then that law or rule of practice or authority of the United States is so involved in that case as that it is necessarily all the time presented to the court for its consideration and adjudication. No court could properly decide such a case without considering and determining the effect of such laws, rules or authority, and without adjudicating upon the rights or immunities arising from or under them. By necessary intendment this Federal question was in this case from the inception, and no judgment was rendered or could be rendered in the case without an adjudication upon such Federal question. The bond itself did not state what damages might be recovered.

As alleged in the petition, the condition of the bond was: —

> "Now if the said Missouri, Kansas & Texas Railway Company will abide the decision which may be

made in said case No. 2092, upon said injunction, and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation shall be void; otherwise to remain in full force and effect."

The petition then alleged the dissolution of the injunction; that the plaintiff had expended and incurred liability for a large amount for attorneys' fees, and then alleged, as a breach of the bond, that the defendant had failed to pay the plaintiff such damages. It was necessary to turn to something outside of the bond to ascertain what damage it was that the makers of the bond had contracted to pay in the event of the dissolution of the injunction. The plaintiff, conceding that the Federal court, where the bond was given, did not recognize attorneys' fees as proper damages upon an injunction bond, yet insisted that the measure of the damages was to be ascertained by the rule that the State courts applied to bonds given in injunction suits in State courts, whereas the defendant denied such claim and contended that the damages were to be measured by the rule prevailing in the Federal court where the bond was given. Certainly this contention presented a Federal question which must have been determined in order to properly decide the case. But what we are now concerned with is when was such conflicting contention presented. If it was never presented until this time of course the case can not now be reviewed by this court, — but if it was made in the State courts before the first decision was reached in the Kansas City Court of Appeals, then it was in time. I do not wish to consume unnecessary time in going over that ground, and only suggest that, from the nature of this question, as above stated, it

must be considered as having been presented to the trial court for its determination, and that in the ruling of that court upon the instructions given and refused, and in rendering the judgment which was rendered it was impossible for the court to have avoided a decision upon that question. It will be noticed, from the brief at page 50 of the Record, that it was expressly stated to the Kansas City Court of Appeals that on the trial in the court below the plaintiff relied upon the case of Wash *v.* Lackland, 8 M. A. 122, as authority for including attorneys' fees as damages, and as overcoming the contention of the defendant that the measure of liability established by the Federal courts should prevail, — thus showing that the same questions were argued and the same authorities presented upon the trial of the case in the Circuit Court as upon the presentation of the case in the Court of Appeals.

But, as already stated, it is not necessary to rest this case upon what was done in the trial court, provided it unmistakably appears that the question was fairly, clearly and distinctly presented to the Court of Appeals prior to the motion for rehearing, and to that I now ask the Court's attention.

Reference has already been made to the "points" presented in the briefs filed in the Kansas City Court of Appeals. The justification for reference to those briefs is to be found in the Code of Practice of Missouri, which will be more fully considered later on. For the present I ask the Court to notice what was submitted in those points and what contentions were made by the respective sides when the case was first submitted to the Court of Appeals. The briefs, which by the practice in Missouri are made the assignments of error and the joinder in error, are printed at length in the record now before this court. In the brief of the appellant in that court, the plaintiff in error here, the following points were made: —

" POINTS AND AUTHORITIES.

I.

There can be no recovery of damages in an injunction suit except on the injunction bond. The right of recovery depends entirely upon the bond.

St. Louis *v.* St. Louis Gas Co., 82 Mo. 349;
Teasdale *v.* Jones, 40 M. A. 243;
Campbell *v.* Carroll, 35 M. A. 640;
Keber *v.* Bank, 4 M. A. 195.

II.

The law in force at the time the bond is made is to be considered as incorporated in it, and a part of the contract.

Mix *v.* Vail, 86 Ill. 40;
2 Am. & Eng. Enc. of Law, 466.

Where there is no statute prescribing the conditions of the bond, they are determined by the rules of the court and the discretion of the chancellor.

Murfree on Official Bonds, Sec. 401;
Newell *v.* Partee, 10 Humph. (Tenn.) 325;
Nolan *v.* Jones, 27 M. A. 502;
Rubelman Hdw. Co. *v.* Greve, 18 M. A. 6;
Teasdale *v.* Jones, 40 M. A. 243;
Kinealy *v.* Stead, 55 M. A. 176, 180.

The bond is a part of the record in the case and of the court in which it is given.

Pickett *v.* Boyd, 11 Lea (Tenn.), 498–503;
Murfree on Official Bonds, Sec. 401.

Therefore the rules and practice in the Federal court entered into and became a part of the bond sued on in this case.

III.

The terms and conditions of the bond sued on must be construed under and determined by either the rules and practice of the Federal court, or by the statute and decisions of Missouri. On either theory the court erred in rendering judgment for plaintiff in this case.

Viewed as a bond subject to the rules and practice of the Federal courts the judgment was erroneous because: —

a. The principal damage allowed was attorney's fees, which are not considered an element of damages on an injunction bond in a Federal court.

Oelrichs *v.* Spain, 15 Wall. 211.

The case of Wash *v.* Lackland, 8 M. A. 122, relied upon as establishing the contrary, does not fairly meet the question. The bond in that case did not contain the same conditions as the bond in the case at bar. Moreover that case wholly ignored the other cases in this State giving the proper construction to be put on the language of the bond, and also the theory of bonds and damages thereon in injunction cases.

b. An attorney's fee was allowed and taxed as costs in the case and paid by this defendant, in accordance with the general practice in Federal courts.

c. No damages were adjudged on the dissolution of the injunction, and under the conditions of this bond there could not be any recovery upon it in any court, or at any time.

2 High Inj., Sec. 1656;
Bein *v.* Heath, 12 How. 168;
Deakin *v.* Lea, 11 Biss. 34."

(Record, pp. 42 and 43.)

Farther on the court will find that these propositions were elaborated before the Court of Appeals, in the following manner: —

" Another objection to the judgment of the court below is that attorneys' fees are not an element of damage upon

bonds given in the Federal courts, and therefore the plaintiff was not entitled to recover in this case.

An injunction bond is as much a part of the proceeding in a court as any other act that may be done in a case, and while the bond may be sued on in any other court, yet the rights and liabilities arising upon it ought to be determined from the terms of the bond itself with reference to the rules of law and practice governing the court by which the bond was required. It is settled by the authorities cited under Point II of the brief that the law in force at the time an injunction bond is given is to be considered as incorporated in it, and as part of the contract. This is a general rule applicable to all contracts. And it has also been decided that where there is no statute prescribing the conditions of a bond, they are to be determined by the rules of the court in which the bond is given or by the discretion of the chancellor. So much is the bond a part of the proceeding in the particular court that it is regarded as a part of the record in that case. In the case at bar the plaintiff sued upon a copy of the bond because the original was a part of the records of the Federal court at Jefferson City, where it still remains. The bond is so far governed by the statute or the rules of practice governing the court in which the bond is given that any conditions or obligations beyond those required by the statute are void, and will not be enforced. This was so held by the St. Louis Court of Appeals in Rubelman Hardware Co. *v.* Greve, 18 M. A. 6, and by this court in Nolan *v.* Johns, 27 M. A. 502. As there is no statute regulating injunction bonds in the Federal courts the rules and practice in those courts take the place of the statute, and everyone giving a bond of that character in the United States court is to be considered as having made the bond with reference to the liabilities and subject to the conditions established and recognized by such rules and practice. The promulgated rules and the rules of law established by the decided cases in those courts must be understood to be incorporated in and to become a part of the contract evidenced by the bond, and therefore the obligation of the maker of the bond or the right to recover by the defendant in the injunction suit is to be determined by the measure of

liability or right created and recognized by the rules and decisions of the Federal courts, and not by the statute of a State designed to regulate similar bonds given in the State courts."

(Record, pp. 48 and 49.)

No matter how feebly it may have been done, yet it was unmistakably argued that the lower court had erred in applying the State law to this bond given in the Federal court instead of the measure of liability established by the rules and decisions of the Federal courts, and that the law of contracts required that the court should apply the law governing in the place and in the court where the bond was given, instead of that prevailing in the court where the bond might be sued upon. Authority was cited to show that when a bond was given in one State and sued upon in another State the law of the State where the bond was given should prevail, and then the relation of the Federal courts to the State courts was likened to that existing between the courts of two States, and it was sought to apply the above rule. The fallacy of the rule adopted by the trial court and invoked by the plaintiff in that court, namely, that the State court as the trial court should apply to this bond given in the Federal court the same rule that it would apply to a bond given in such State court, was attempted to be pointed out by showing that such a rule would give the same contract one meaning and one effect in one jurisdiction and an entirely different meaning and effect in another jurisdiction. Then farther reference was made to the cases which had been relied upon by the plaintiff in the trial court, and which were again invoked in the Court of Appeals, and the effort was made to show wherein they were illogical and not founded in reason. I submit that all this, no matter how far it may have fallen short of having been a convincing argument in the Court of Appeals, can have but one effect, and that is to clearly demonstrate

the fact that the Federal question now invoked and relied upon was urged upon the attention of the Court of Appeals in the original brief filed in that court, and was presented in such manner as that the court could not avoid a decision of that question.

In this connection I also call attention to Point V, of the Respondent's Brief upon the original hearing in the Court of Appeals (Record, p. 60), filed after being served with the appellant's brief, to which I have already directed attention, and before any opinion or judgment whatever was rendered by the Court of Appeals, I quote that point as follows:—

"V.

"Appellant is liable for all damages sustained by respondent in consequence of the suing out of the injunction, which he necessarily incurred in procuring a dissolution thereof, although by the rules of the Federal courts no such damages as are claimed by respondent are allowed by the rules of those courts. It does not follow that appellant is not liable for the attorney's fees and personal expenses of respondent in procuring a dissolution of the injunction because they could not be recovered in the court where the bond was given. Appellant's contention would make an injunction bond, a bond for the costs of the suit only. 'It will not be assumed because the Federal courts did not allow such fees that the sureties contracted with that rule of law in view.' Nor is the amount to be recovered to be limited to the rate at which the fees would be taxed as costs in the Federal courts.

3 Sutherland on Damages, pp. 1110 and 1111;
Mitchell *v.* Hawley, 79 Cal. 301;
Aiken *v.* Leathers, 40 La. An. 23;
Wash *v.* Lackland, 8 M. A. 122, *supra;*
Meyers *v.* Block, 120 U. S. 642, *supra.*"

Thus showing that the respondent's counsel considered that the Federal question was then before the court for its ruling and decision, and that an argument was being presented and authorities cited against the contention in regard to such right under the law or authority of the United States which was being invoked by the appellant. I realize that this Court may hesitate to accept these briefs of counsel in the Court of Appeals as part of the record in the case, coming from that court, but, as already suggested, I hope to be able to satisfy the Court that under the practice in that State, and under the principle of certain decisions in this Court, we are entirely justified in resorting to the briefs to ascertain just what questions were submitted to the Kansas City Court of Appeals for its decision. Without yielding my right to make such reference, I might even concede for the present purpose that the briefs are not to be regarded as a part of the record proper, and are not to be considered by this court at this time, and yet I believe I can establish to Your Honors' satisfaction that the question already suggested as a Federal question was presented to the Court of Appeals at the very inception, and was so understood by that court, and that the question was directly passed upon and determined by that court, and this I will undertake to do by the opinion of the Kansas City Court of Appeals, which, without question, must be considered a part of the record in the case. The cases from which I have already quoted show that this court in many instances has relied upon the opinion of the State court of last resort to ascertain whether or not the Federal question had been presented and had been determined. Such is the effect of Section 15 of Article VI of the Constitution of Missouri, and of Rule 8 of this court. By turning to that opinion in the Record Your Honors will see that Judge Gill, who delivered the opinion of the Court of Appeals in this case, undertook to state the propositions presented

by the appellant for the consideration and adjudication of that court, by saying: —

> "Defendant's objections to the judgment below may be thus stated: First * * * and secondly, it is contended that as the injunction bond was given in a proceeding pending in the United States court the damages must be fixed and determined according to the rules and practice of the Federal courts. That attorneys fees' are not there considered elements of damage in suits on injunction bonds, and that therefore our State court should apply the same rule in suits on bonds given in Federal courts." (Record, p. 66.)

Then, if Your Honors will turn to the second paragraph of the opinion of the Court of Appeals, set forth on page 68 of the Record in this Court, you will find that the specific question was taken up and disposed of by that court in the following language: —

> "II. The second position of defendant's able counsel is also untenanable. His contention is that plaintiff is not entitled, in a suit on this bond, to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded, as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction bond. But it is claimed that because this bond was made in a suit at the time pending in the Federal court, no attorneys' fees should be allowed because contrary to the holding of such courts in like cases.
>
> Reason and authority, we think, stand opposed to this contention: —

2 Sutherland on Damages, Sec. 525 (2d ed.);
H. & St. J. R. R. Co. *v.* Shepley, 1 M. A. 254;
Walsh *v.* Lackland, 8 M. A. 122;
Mitchell *v.* Hawley, 79 Cal. 301;
Aiken *v.* Leathers, 40 La. An. 23.

As said by the Supreme Court of California in case above cited: 'Bondsmen, in such a case, cannot be held to have contracted with the understanding that a suit would be brought upon the bond (if at all) in a Federal court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California (which was probably the fact) an action on the bond could probably not be maintained in a Federal court at all.'

So, in the case at bar, it cannot be said that this defendant and its sureties, when they executed the bond in the injunction suit, contracted with reference to the particular ruling of the Federal courts as to allowing attorneys' fees as damages, for, as already stated, the defendant in the injunction suit might, on a dissolution thereof, proceed against them in the State courts where a different rule prevails and where counsel fees are regarded as a proper element of damages to be assessed on the bond. Judge Bakewell, speaking for the St. Louis Court of Appeals, in R. R. Co. *v.* Shepley, *supra*, uses this language: 'A bond of this kind is to be interpreted by the rules that govern the interpretation of any other contract. If the obligor, when executing it, knew that under the ruling of the Supreme Court of the United States he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the Supreme Court of Missouri upon the same ob-

ligation, in a similar proceeding, he would be held for counsel fees in case of failure to maintain his injunction.' ''

When the Court of Appeals in that opinion thus unmistakably stated what the contention of the railway company was, and thus clearly and unmistakably decided adversely to the contention of the railway company, I submit there ought now to be no question about the Federal question having been raised in proper form and in due time. If we recur to those statements of this court where it is said that what is meant by being specially set up or claimed is that the right or immunity was unmistakably claimed, and that it is sufficient if it appears from the record that such right was set up or specially claimed in the State court in such manner as to bring it to the attention of that court, and that if it appears that the Supreme Court of the State regarded even general allegations as asserting a Federal right or immunity, and denied the claim so asserted, then the jurisdiction of this court upon writ of error would be sustained; if, I say, we may resort to these statements and to the other quotations previously made, as indicating the correct rule to govern in determining the jurisdiction of this court, I submit that the Kansas City Court of Appeals by its opinion has settled the question in favor of the plaintiff in error without the possibility of a doubt, because it has stated the contention in unmistakable terms and has decided against it in equally unmistakable language.

V.

The briefs filed in the Kansas City Court of Appeals constitute part of the record in the case, and justify a resort to them to advise this Court as to what questions were presented to that court for its decision. The statutes and the

rules of the Kansas City Court of Appeals necessary to a proper understanding of this matter are fully set forth in subdivision 3 of Point II of this brief (*ante*, p. 18). Prior to the revision of the Statutes of Missouri in 1889, "assignments of error" were required to be filed in the appellate courts, but under that revision such requirement was omitted. In the brief I have referred to that portion of the Code of Practice relating to practice in the Supreme Court and the Courts of Appeals as being Sections 585 and 593 of the Revision of 1889, but of course cannot be expected to print the statute at length in order to show that it does *not* contain any provision regarding "assignments of error." It will not be contended by opposing counsel that there is any such requirement in Missouri. By Section 2301, however, of the statutes of 1889, an appellant or plaintiff in error in the State of Missouri is required to "make out and furnish the court with a clear and concise statement of the case and the points intended to be insisted upon in argument." This is the only provision of the statute making any provision for presenting to the appellate courts the errors complained of or the points relied upon for a reversal of a judgment.

By the rules of the Kansas City Court of Appeals, also set forth in the brief (*ante*, p. 19) and to be found in the appendix of the reports of that court, the details for a compliance with the above statute are provided. Rule 15 requires that the appellant or plaintiff in error shall file with the clerk of such court five copies of a printed abstract or abridgement of the record "together with a brief containing in numerical order the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof." Rule 17 provides: "The brief on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the

errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified." In the Revised Statutes of 1879, being those immediately preceding the revision of 1889, Sections 3764 and 3765 provided for the filing of "assignments of error" and for "joinder in error" in all cases in the appellate courts. These are the sections and the provisions of the Code of Practice which were omitted from the Revision of 1889. The question of practice under this change of the statute was before the Kansas City Court of Appeals in the case of Donnell Mfg. Co. *v.* Hart, 40 M. A. 512. In that case a motion to dismiss the appeal was made, on the ground that no "assignments of error" had been filed in the Court of Appeals. This motion was overruled, the court remarking: "By reference to Article 12, Revised Statutes, 1889, it will be seen that Sections 3764 and 3765, Revised Statutes 1879, have been omitted from the new revision and that it is not now required to assign and join in error more than such assignment may be made by briefs required by Section 2301, Revised Statutes, 1889." Later, in the case of the Mo. Valley Cut Stone Works *v.* Brown, 50 M. A. 407, a similar contention was made as in the preceding case, which was very summarily disposed of by the court in the following language, at page 413 of the report: "Plaintiff makes the point that no formal assignment of errors was made by the appellant. Under our recent statute, this is not necessary."

This condition of the Code of Practice in Missouri, and the interpretation put upon it by the Kansas City Court of Appeals, conclusively shows that there is no other manner in which the appellant can present the points it desires to make in the appellate court in that State, except through the points made in its brief.

The amendment of the Judiciary Act of 1789 by the Act of 1867 afforded this Court the occasion for considering

the new conditions that had arisen in the meantime, from the numerous changes in practice in the various States. Many of the old formalities of Common Law Procedure were either materially modified or abandoned altogether. It was realized that these changes in the methods of procedure in the different States necessarily changed the constituent parts of the "record" of a case, and the old idea of a common law record was probably too restricted to accomplish the purpose intended by the Constitution and the Judiciary Act, with reference to the right and duty of this Court to review the decisions of the highest courts of the several States, and thus this Court, speaking through Mr. Justice Miller, was induced to say, in the case of Murdock *v.* Memphis, 20 Wall. 633: —

"It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' Williams *v.* Norris, 12 Wheat. 117; Rector *v.* Ashley (*supra*). What was the record of the case was pretty well accepted as a common law phrase at the time that statute was enacted. But the statutes and new modes of proceeding in those courts had changed and confused the matter very much since that time.

It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. R. R. Co. *v.* Marshall, 12 How. 165; Cousin *v.* Labatut, 19 How. 202. And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court, signed by its Chief Justice or presiding officer on that point, though not as conclusive; and these opinions are quite as satisfactory, and may more properly be treated as part of the record, than such certificates."

This language was quoted and adopted with approval by this Court in the case of Gross *v.* Mortgage Co., 108 U. S. 477, and in the latter case the Court, speaking with reference to the opinion of the State Court in the case then before it, said:—

"We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title or immunity under the Constitution or Laws of the United States and specially set up and claimed by the party who brings the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires not only that the Justices of the Supreme Court of the State shall deliver and file written opinions in cases submitted to it, but that such opinion shall also be spread upon the records of the court, 'such opinion shall also be spread upon the records of the court.' This statutory provision was simply to bring the case within the rule which permits an examination of the opinions of the Supreme Court of Illinois, to ascertain whether the case was determined upon any ground necessarily involving a Federal question within the reviewing power of this Court."

In view of the soundness of the reasons suggested in these opinions, the Court finally adopted Rule 8, which makes the opinion of a State court part of the record, at least for this purpose. These cases and this rule show that it is not the policy of this Court to so restrict its inquiries as to exclude any reasonably proper sources of information. When the words "on the face of the record" were eliminated by the amendment, accomplished through the act of 1867, the Court was given the latitude to determine from what sources it would obtain correct information as to whether or not a Federal question had been so presented and decided as to authorize a review of the case upon writ of error from this Court. The

real purpose of the Court evidently is to resort to those portions of the proceedings in the State court which may be regarded as reliable sources of correct information upon the subject. While it is true that, generally, this Court has said, ever since the views expressed in the cases quoted from, that the briefs and arguments of attorneys are not to be considered as part of the record for this purpose, yet that was said with reference to cases coming from courts where the briefs could in nowise be considered as portions of the record. In the State of Missouri, as just shown, by the amendment of 1889 the practice in the appellate courts was so far modified as that no such paper as an "assignment of error" was longer required in the appellate courts of that State. Under the old practice, and under the practice prevailing in many places, and still prevailing in this Court, "assignments of error" must be filed in order that the Court and everyone concerned may know just what contentions are made and just what propositions are to be submitted and passed upon. There can be no question that formerly these "assignments of error" would constitute part of the record in the case, and undoubtedly there would be nothing in the case, and no part of the record in the case, that would more clearly and certainly point out and determine what questions were presented for the consideration of the Court. It does not follow, of course, that the Court *decided* every proposition or contention presented by the "assignments of error." That must be determined from the opinion and the judgment of the court, — but unmistakably, we cannot find any better source of information as to what points are *made*, or what questions are *presented*, than by turning to the "assignments of error" in those cases where the practice of filing the same prevails. Under the present practice in Missouri, however, there is no such step in the proceeding

under the particular designation of "assignments in error," but there is in fact the same thing through a different requirement and under a different name. That is, the statute, and the rules of court, made by virtue of other sections of the statute, require the appellant or plaintiff in error to file a printed brief at a specified time, in which *the points relied upon for a reversal of the judgment must be set forth in numerical order*, to which may be added a citation of authorities relied upon in support of the same. This is so similar to the former requirements for filing formal "assignments of error," that if it had never been passed upon in the State courts, we ought to have no difficulty in reaching the conclusion that these points made and presented in the brief of counsel are equivalent to, and are filed in lieu of, and are intended to take the place of, the old formal "assignments of error." But we are not left to urge upon the Court our own views of the proper construction of the present statutes, nor as to the true meaning and effect of the change which omits any requirement of formal "assignments of error," and instead requires the filing of a brief with points set forth in order, as above stated, because the Kansas City Court of Appeals, whose judgment is now before this Court for review, has determined that question, and in the cases above cited has decided just what we contend, namely, that the briefs of counsel setting forth the points relied upon and the authorities cited in support of them, take the place of the old "assignments of error," and, as was said in the case of Donnell Mfg. Co. *v.* Hart, *supra*, "It is not now required to assign and join error, more than such assignment may be made by briefs required by Sec. 2301, Revised Statutes, 1889." If nothing more is required by the Code of Practice of Missouri, and if, consequently, nothing more is done in a case in one of the appellate courts of that State, how else can we expect to learn what contentions were made by an

appellant or plaintiff in error, or how otherwise can we know what questions were presented to the court and what claims were made as a ground for the reversal of the judgment of the lower court? In view of this condition of the Code of Practice in Missouri, and in view of what this court said with reference to the opinions of the State Courts, even before the adoption of Rule 8, I submit that whether we may properly say that the briefs of counsel are strictly part of the record or not, yet they must be so far regarded as part of the record as to justify a resort to them, along with the other parts of the record, to ascertain what questions were presented to the State court for its consideration.

In the case at bar there can be no question about the propositions and the points which were submitted and made in the Kansas City Court of Appeals, because the plaintiff in error here, — appellant there, — specifically stated, as a reason for reversal of the judgment of the Circuit Court that the right of recovery depended entirely upon the bond sued upon; that the liability under that bond was to be measured by the laws in force at the time and place that the bond was made; that, it having been made in the Circuit Court of the United States, the bond was a part of the record in that court; that the rules and practice, and the law of liability on such bond, as prevailing and applied in that court, entered into and became a part of that bond; that since attorneys' fees were not an element of damages, according to the law and rules of practice in the Federal court where the bond was given, they could not be recovered in this case; — the appellant even went so far as to give the reasons why the authorities relied upon by the other side were insufficient and should not be followed (Record, pp. 42, 43 and 48–52). Then the respondent in that court came in with his brief, and in Point V thereof stated his contention against the position of the appellant, and

cited in support thereof the very authorities relied upon by the Court of Appeals in its opinion (Record, p. 60). As there was no other assignment or joinder in error than as shown in these briefs, and for the reasons already given, if the court will, as I submit it should, consider these briefs for the purpose of ascertaining what questions were presented in the Court of Appeals, there should be no hesitation in saying that the plaintiff in error unquestionably urged upon the lower court, as a reason for reversing the judgment, the very question which it now relies upon as the Federal question in this case.

By way of recapitulation I submit farther that, even independently of what is shown by the briefs, the pleadings, themselves, which beyond all dispute are part of the record, necessarily involved this question: that when the plaintiff alleged the making of a bond in an injunction suit pending in the United States court, and farther alleged a breach of the bond, in that plaintiff in the injunction suit had not paid him the amount of attorneys' fees which he had expended or incurred with reference to that injunction suit, and claimed the right to recover the same in such action upon that bond, and then when the defendant in that case, by way of answer, although admitting the execution of the bond, denied the right of the plaintiff to recover the damages which he claimed, there ought to be no hesitation in saying that every question involved in ascertaining whether or not the plaintiff was entitled to recover at all, or in measuring the damage that he might recover upon such bond, was necessarily involved in the trial of that case; and when the defendant prayed the declarations of law which it did, it specifically presented every element necessary to the plaintiff's case, and every question necessary to be determined in deciding that case; and therefore there was brought before the trial court, both by the pleadings and the instructions, the

question that a party who gives a bond in an injunction suit pending in one of the Circuit Courts of the United States, is entitled to immunity from liability for attorneys' fees incurred by the opposite party in such case, by reason of the rules of law and practice prevailing in that court, which entered into and became a part of the contract evidenced by the bond; and when such defense was made it was invoking a right and an immunity under an authority exercised under the United States.

But we may pass by even all of these matters and recur again to the opinion of the Kansas City Court of Appeals, itself, which, as we have already shown, clearly recognized that it was called upon to adjudge between the parties concerning this right and immunity, which the defendant, plaintiff in error here, claimed under the authority of the Circuit Court of the United States, because of the law prevailing in that court at the time the judge of the court required the bond to be given. That there may be no mistake that the Court of Appeals did consider that such question was presented for its decision, I again quote from the opinion as follows: —

"It is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts; that attorneys' fees are not there considered elements of damage in suits on injunction bonds, and that therefore our State courts should apply the same rule in suits on bonds given in the Federal courts" (Record, p. 66); and farther on as follows: —

"His contention is that plaintiff is not entitled in a suit on this bond to recover, as an element of damages, the fees paid attorneys in defending against the injunction suit. It is conceded, as a general proposition, that under the laws of Missouri, as announced by its courts, and indeed as decided by nearly every State in the Union, counsel fees are recoverable as damages on an injunction

bond. But it is claimed that because this bond was made in a suit at the time pending in a Federal court, no attorneys' fees should be allowed, because contrary to the holding of such courts in like cases. Reason and authority, we think, stand opposed to this contention." This is certainly conclusive that in the question which the plaintiff in error now relies upon to give this court jurisdiction was understood by the Kansas City Court of Appeals to have been submitted to it for its decision, and that it did decide it is equally conclusively shown by the subsequent portion of the opinion in which that court gives its reasons for denying the contention that the present plaintiff in error made in that case.

Therefore, we must say that the question was presented to and decided by the Kansas City Court of Appeals, adversely to the contention of the plaintiff in error, and we must also conclude, as previously shown in this brief, that the question is a Federal question; that the right and immunity claimed by the plaintiff in error was one that arose from the exercise of authority under the United States by one of the courts of the United States; that it is the result of the law as adopted, declared and enforced by the courts of the United States, that attorneys' fees are not to be regarded as an element of damage. There can be no logical conclusion reached in regard to the subject, unless we say that this rule of law entered into and became a part of the bond here sued upon. If it were not so, then the power of the United States courts to determine what sort of obligations they will require when granting injunctions, is absolutely taken from them. It is within the power of every party who may have a right to sue upon an injunction bond which the United States court may require from his adversary, to bring a suit upon it, as was done in the present case, for a sum too small to permit a removal to the Federal court, and thus a party to a bond or to the suit in which it is given may, at his own will, enforce a liability upon the bond contrary to the

theory that the Judge of the United States court had regarding it. It is only fair to say that when the Judge of the United States court requires an injunction bond be given in a case pending before him, as the condition upon which he will grant an injunction, he means to impose a liability, in case of a failure to maintain the injunction, in accordance with the law as he understands it, and as it would be applied in his court. But when the party from another State has given such bond, and is afterwards sued upon it, he cannot remove the case if the damages claimed do not exceed $2,000.00. If the amount sued for was in excess of $2,000.00, he might remove the case to the Federal court, where it is conceded by the defendant in error, and by the Kansas City Court of Appeals, there could be no recovery on account of attorneys' fees, which it must also be conceded would be in accordance with the obvious intention of the judge who required that bond; and yet that intention will be thwarted, and the will of the court where the bond is given will be defeated by merely reducing the amount below $2,000.00, and thereby prevent a removal to the United States court, — thus bringing about the anomalous result that the same bond means one thing in one court and an entirely different thing in another court; that it authorizes a recovery of attorneys' fees in a State court, but does not authorize such recovery in a United States court. And again, if by chance the parties should be citizens of the same State at the time an action was brought upon the bond, then there would be no right of removal, even though the amount claimed was greatly in excess of $2,000.00; and in that event, according to the decision of the Kansas City Court of Appeals in this case, the party would be entitled to recover, while if, perchance, either party was a resident of another State then the suit might be brought in or removed to the United States court, and then there could be no recovery. Thus the

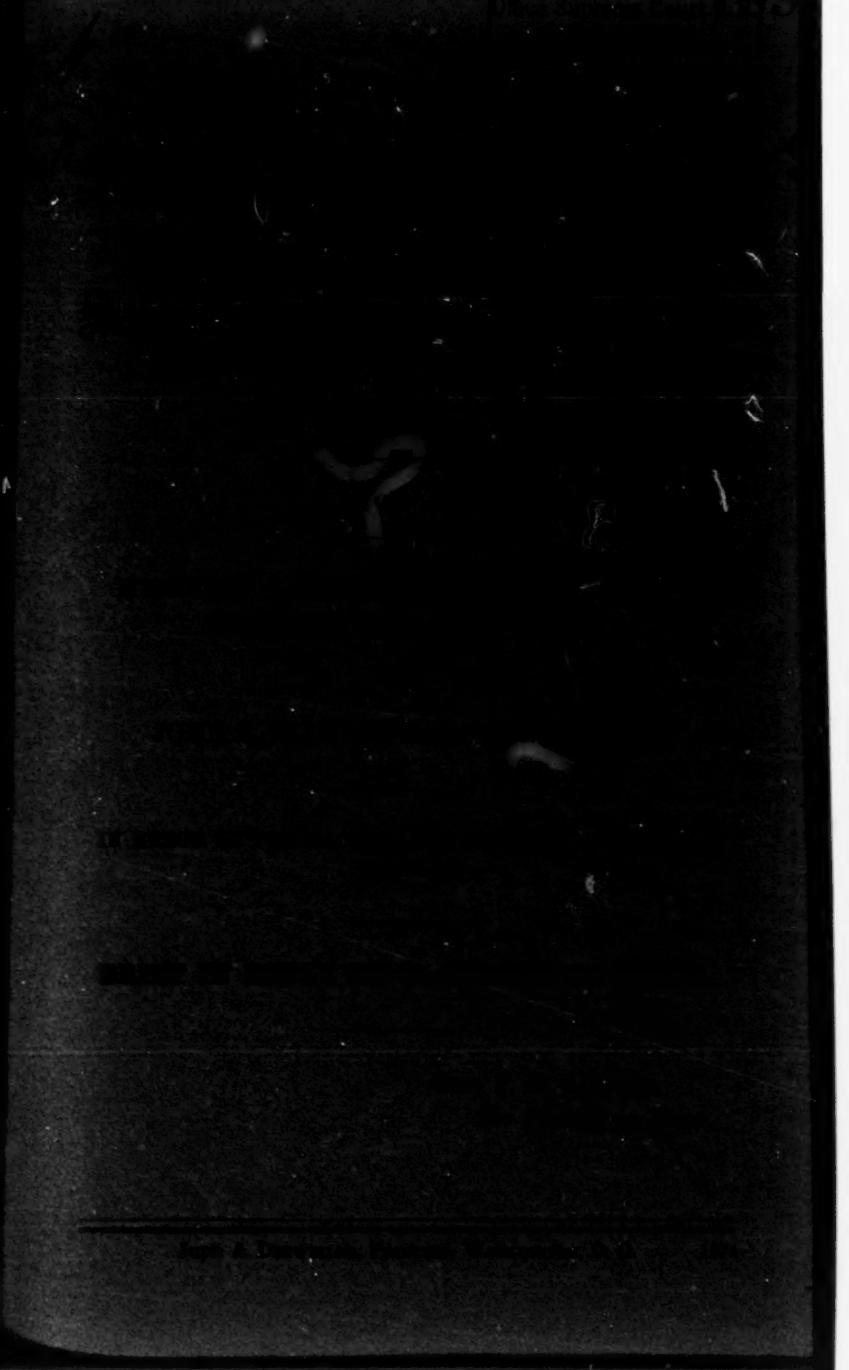
contract would be made to mean one thing in favor of a citizen of Missouri, for intance, namely, that he might recover, whereas with reference to a citizen of Kansas or some other State, he could not recover. Certainly the law never intended any such construction of a contract which contemplates such inharmonious results. Since a contract made in obedience to the order of the Circuit Court of the United States should not be forced into such absurd possibilities, and since the authority of the United State court, exercised through one of its courts, should not be subjected to such ridicule as that, the only means of correcting it in such a case as the one at bar is through a writ of error from this Court to the State court.

For these reasons I submit, in conclusion, that the Court must hold that the case involves a Federal question; that it was properly presented in due time in the Kansas City Court of Appeals, and that the decision of such question was adverse to the plaintiff in error, and therefore the judgment of the State court should now be reversed.

Respectfully submitted,

GEO. P. B. JACKSON,

For Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 148.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN S. ELLIOTT, DEFENDANT IN ERROR.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

BRIEF IN REPLY BY PLAINTIFF IN ERROR.

The defendant in error, through the brief filed in his behalf, seems to place his principal reliance upon the proposition that the Federal question involved in this case was not presented with that formality that is necessary to entitle the plaintiff in error to a review of the case by this court. In support of that position a number of cases are cited from Missouri, which it is claimed establish the proposition that the supreme court of the State of Missouri cannot

consider a constitutional question unless it appears that the same was formally presented by some pleading or instruction in the trial court. An examination of the cases referred to, however, will satisfy this court that all that the supreme court of Missouri was considering in those cases was the question of whether or not the appeal in the particular case would lie to the supreme court or to the court of appeals, and in determining that question it unquestionably did rule that to make a case appealable to the supreme court the question must have been expressly presented in the trial court, for the reason that whether the case was appealable to one court or another was a matter to be determined at the time that the appeal was allowed and to be determined by the court granting the appeal, and as a matter of course the jurisdiction of the appeal must depend upon the record as it existed in the lower court, because the question necessary to be determined then could not be decided by something that might occur afterwards, but it never was intended to rule that either the constitution of the State of Missouri or the Constitution of the United States should be deliberately violated because the point had not been specifically made at some particular stage of the proceeding. In the constitution of Missouri the appellate jurisdiction of the supreme court and the courts of appeals is not expressed in the clearest manner. That jurisdiction of these different courts is to be ascertained from the constitution, as originally adopted, in 1875, and as amended in 1884. In the original constitution there was a peculiar scheme of appellate jurisdiction, lodging in the supreme court all appellate jurisdiction for the State, except the city of St. Louis and a few neighboring counties. The St. Louis

court of appeals was created with appellate jurisdiction in all cases, regardless of the amounts and regardless of the questions, in that city and those counties, with the right of appeal from the St. Louis court of appeals to the supreme court in certain cases, involving more than a certain amount, and those involving the construction of the Constitution of the United States or of the State of Missouri, and cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question, and certain other cases involving revenue laws, title to real estate, public offices, and where counties were parties. Then, in 1884, the Kansas City court of appeals was established, and the State was divided into two divisions, one being assigned to the St. Louis court of appeals, and the other to the Kansas City court of appeals, and, instead of prescribing the jurisdiction of the supreme court and of the courts of appeals in direct terms, it was accomplished through a rather involved statement to the effect that in all such cases as were formerly appealable from the St. Louis court of appeals to the supreme court appeals should lie from all portions of the State directly to the supreme court, and in all other cases appeals should lie directly to the respective courts of appeals; so that the whole question, so far as the jurisdiction of the court of appeals or the supreme court is concerned, is determined by the class in which the case may fall under these provisions, and since, as already suggested, the trial court must determine while it still has jurisdiction of the case to which court the appeal shall go, and as the appellate court must afterwards determine that question with reference to the same time, the supreme court has ruled

in the cases cited by the defendant in error that such question can only be determined from the record as it existed in and came from the trial court.

In all of these cases the court will find some language indicating that the ruling made was with reference to the appellate jurisdiction of the supreme court, and for the purposes of jurisdiction the court looked only to the record as it came from the lower court. Necessarily the court said that, for the purposes of its jurisdiction, a constitutional question could not be injected in the case by the briefs of counsel, because those briefs did not exist when the appeal was granted and when the record was made up in the trial court, but were only filed when the case was ready for submission to the appellate court.

In this connection I desire to correct a mistake into which counsel for defendant in error has fallen when he says that the plaintiff in error, as appellant in the State court, prayed an appeal to the Kansas City court of appeals. Even if it were a fact that the plaintiff in error or its counsel had made a mistake on that subject, it could not control the jurisdiction of the courts, nor would such a mistake change the fact of the presence of a Federal question in the case; but as a matter of fact no such prayer was made. It is not in accordance with the practice in Missouri in perfecting appeals to ask that the same be sent to any particular court. It is not necessary to file any formal application or petition or writing whatever for an appeal. Under the practice in that State, it is simply necessary to file an affidavit stating that the affiant believes that the appellant is aggrieved by the judgment of the court, and that the appeal is not taken for vexation or delay;

this is all that is necessary to be filed; and thereupon the trial court grants the appeal and orders the case certified to whichever court it deems proper; so that whatever mistake was made in sending this case to the Kansas City court of appeals was not the mistake of the appellant in that case, plaintiff in error here, but simply was an additional error committed by the trial court, according to the theory that the plaintiff in error had of the case. The counsel for defendant in error further contends that this court is concluded by the ruling of the State court with reference to whether or not the Federal question was sufficiently presented in the State court; but certainly this cannot be seriously contended for. If so, it could be the means of preventing the review of any case by this court. No matter how palpable the question might be, yet, under the contention of the defendant in error, if the State court will say the Federal question was not presented with sufficient formality, yet, notwithstanding under any other theory and for any other purpose and to any other mind, the question was plainly in the case and certainly insisted upon, still this court could not review it. It is not necessary to repeat here, nor even to refer, to those cases in which this court has said that its jurisdiction cannot depend upon the assertion of the State court, either in favor of or against that jurisdiction, but that this court itself must examine the record in a case in order to see whether it involves and presents such question and in such manner as to invoke the exercise of the power conferred upon this court by the Constitution and laws of the United States. But again, in making the point which he does, the defendant in error assumes a very singular position. It is not pretended that the Kansas City court of appeals in de-

ciding this case held that the question was not properly presented for review, but reliance is placed upon the opinion of the supreme court of the State of Missouri in the proceeding instituted by this plaintiff in error in its endeavor to arrest proceedings in the court of appeals and have the case certified to the supreme court—a proceeding collateral in a sense. At the outset, in the original brief, the plaintiff in error disclaimed any purpose or intention of invoking or relying upon anything that occurred in that proceeding in the supreme court as a foundation for its right to a writ of error in this case, and unquestionably, under the law and under the decisions of this court, such disclaimer was proper; but it is rather a singular position for the defendant in error to take when it appeals to the ruling made in that case to determine whether or not the question was properly raised, since the decision in that court cannot be any ground for determining the right to the writ in this case. So far as the opinion of the supreme court of the State of Missouri in the case of M. K. & T. R'y Co. *vs.* Smith *et al.*, reported in the 154 Mo., is concerned, it is simply available in this case as establishing that the Kansas City court of appeals was the highest court in the State in which a decision could be had in this case. True, it may be referred to, as the decision of any court may be, to ascertain what has been decided in other cases; and since the defendant in error appeals so confidently to the opinion in that case as determining that the Federal question was not properly raised in this case, we may as well now as at any time consider briefly what effect that opinion should have as a persuasive authority, although it cannot be regarded as a conclusive one. That opinion is based

upon a very singular and a very narrow view of the law conferring jurisdiction upon this court to review the decisions of the State tribunals. In that opinion the supreme court of the State stated the contentions of the appellant there (plaintiff in error here), at the trial and in the court of appeals, to have been of the same nature (154 Mo., 312), and notwithstanding the court had quoted at the bottom of page 311 a paragraph from the opinion of the Kansas City court of appeals, setting forth the contention of the appellant, to the effect that because the injunction bond sued on was given in a proceeding in a United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts, and since attorneys' fees are not an element of damages in such courts and on such bonds, therefore the State courts should apply the same rule in a suit upon such bond as the Federal court would, yet that court said:

"That a Federal question could have been raised cannot be denied, but that such question was not raised is manifest."

Then the opinion proceeds to give the reasons why the Federal question was not raised, and in this connection used language which clearly indicates that in that particular case the court was dealing primarily, if not entirely, with the question of the State appellate jurisdiction, and as to whether or not the Kansas City court of appeals had jurisdiction in the case, or whether the question was so presented as to have taken the case to the supreme court of the State. While, with all respect to that court, we still are of the opinion that the question was so involved and presented as to give the supreme court jurisdiction of the

appeal in the case, yet the decision of the Kansas City court of appeals and of the supreme court of Missouri, to the effect that the appeal was properly granted to the Kansas City court of appeals, and therefore that court had power and authority to determine the case, must be taken as conclusive by all parties at this time, notwithstanding this court may in the end reverse the judgment of the Kansas City court of appeals, in which it held that the State courts were not required to enforce the contract in accordance with the law governing in the Federal court where the bond was made.

Recurring to what was said in that case as to whether or not the question had been properly raised, the court, at page 313 of the report, used this language:

"To us the contention of relator does not seem tenable. We fail to discover from the record anywhere 'the validity of a treaty or statute of or authority exercised under the United States is drawn in question' or that a Federal question may be said to be involved in the case. In fact both the petition and the answer in the case before the trial court recognize the validity of the bond and the action of the Federal court in all orders regarding or affecting the same. It is upon the bond as a valid instrument issued by order of proper authority that plaintiff's suit in the circuit court is predicated, and the relator's answer (as defendant) in that suit admits that it executed the bond under the facts stated in the petition, and by way of defense thereto the relator simply answered that the injunction suit in which said bond was given was a mere incident to a main suit then pending between the relator and said John S. Elliott, and that for dissolving the injunction under such circumstances attorneys' fees are not allowable as an item of damages."

And also:

"If no challenge of authority exercised under the United States is in fact made by the record, the mere assertion of

its existence by counsel, coupled with the further fact that such a question might have been made under a proper answer, or by the development of a proper state of facts during the progress of the trial, will not suffice to deprive the Kansas City court of appeals of its jurisdiction to hear and determine upon the case as it reached that court, or to invest this court with jurisdiction thereof."

And then again, on page 315, that court said:

"Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States court, applicable to the liability of bondsmen on an injunction bond given in that court, can in anywise be drawn in question, so as to present a Federal question in a suit in a State court on the bond, *when its validity*, as in the case of Elliott against the relator railway company, begun in the Cooper county circuit court and now pending on appeal in the Kansas City court of appeals, *is admitted and where no question as to the court's authority to order the bond as given is or was made by the relator.*

"As said, the relator, as defendant in the suit now pending in the Kansas City court of appeals on appeal, contested the issue by an answer that in no way drew in question authority exercised under the United States, nor did it set up any claim of right by authority exercised under the United States, *as abridged or taken away*, nor did it deny that the State court, wherein the suit was instituted, had *authority to hear and determine the case*."

And then again, on page 316:

"The *validity* of no statute, treaty or authority exercised under the United States being drawn in question by the relator's answer in the suit on the bond in the Cooper county circuit court that would operate, under article 6, section 12 of the constitution of this State, to divest the Kansas City court of appeals of jurisdiction thereof, hence, no authority, in this court by a writ of prohibition to order that court to stay proceedings therein or to transfer the case here for final disposition on that account, as asked by relator."

These extracts from the opinion show that the court was in fact dealing with the question only for the purpose of determining to which court the appeal would lie, and in harmony with its former decisions upon analogous questions held that the question of appellate jurisdiction was to be ascertained from the record existing in the trial court at the time the appeal was granted. Assuming that the court was right in other particulars, we may agree that that statement was correct; but what I specially desire to direct attention to now is the reason that the court gave for its conclusion that no Federal question was raised, although it is conceded that it might have been. This statement in the opinion is seized upon with much avidity by counsel for defendant in error and presented in his brief as a conclusive reason why this court cannot now entertain this case, and that reason is that this plaintiff in error, as the original defendant in the case, did not *deny the validity of the bond sued upon or of the authority exercised by the United States court, and did not question the right of trial in a State court.* Unquestionably the State court had jurisdiction to try the case. No one has ever contended against that. In fact, it was the only court under all the facts in this case which could have originally maintained jurisdiction. The defendant, although a non-resident of the State of Missouri, could not remove the case to the United States circuit court, because the plaintiff (defendant in error here) sued for just exactly $2,000 to prevent that removal. But because the State court had jurisdiction to try the case, it does not follow that it was justified in trying it upon any other than the correct theory of the law, nor that it should have ignored the law of the jurisdiction in

which the contract was made, and render a judgment upon some other theory of law that cannot by any process of reasoning be claimed to have entered into and become a part of that contract. But the court says, further, that you cannot have a Federal question in a case unless you deny the validity of some law or authority under the United States. The reason, as that court said, that there was no Federal question in this case was not because the defendant there, plaintiff in error here, did not claim that by reason of the fact that the bond was given in a Federal court, and as in such cases attorneys' fees were not an element of damages, it was not liable for the same. On the contrary, that is stated to have been the contention of the defendant, but such contention, it says, did not involve a Federal question. It did not involve an authority exercised under the United States, because it did not *deny the validity of the authority* exercised under the United States. Under the decision of the supreme court of Missouri in that case of the Railway Company *vs.* The Judges of the Kansas City Court of Appeals, and under the contention of the defendant in error, based upon that opinion, that provision of the constitution and the power of this court under it become an absolute nonentity.

If we cannot invoke in a practical and beneficial way the authority exercised under the United States by asserting that it is a valid authority, and thereby make a Federal question, then there is no benefit to be accomplished, through those provisions of the law, by a party invoking the protection of authority under the United States, and the jurisdiction of the courts to adjudicate upon the same. If, as contended by the plaintiff in error and as ruled by the

supreme court of Missouri, we must deny the validity of the authority under the United States before we can put a case in shape to invoke the jurisdiction of the courts of the United States, then we have no use for the jurisdiction of those courts. If the State court should decide that the authority of the United States was void, it would necessarily decide that there could be no recovery, and that would be the end of the matter, but here is a case, and there may be many others similar to it, where a party is forced into court and is compelled to engage in tedious litigation, and in the progress of that litigation it becomes necessary to do many things, and, among others, to enter into an injunction bond. A party has invoked the power of the court, which resulted in giving the injunction bond in order that he might have the benefit and the protection of the authority of the United States, which that court was exercising, and when he invoked that authority he did it with reference to the rules of law controlling the practice in that jurisdiction, and when the court made an order it made it with reference to the rules of law governing the practice in that jurisdiction, and when a bond, as a step in that proceeding, was entered into, it was with reference to the same rules of law governing the practice in that court, and all of it was claimed to be perfectly valid and lawful, otherwise the authority would not have been exercised by that court, and afterwards when the party is sued upon that obligation and an effort is made to recover from him something entirely outside and beyond the rules of practice which had governed theretofore, as before stated, he invokes that authority of the United States as his protection and shield, and says because this valid authority was exercised in a lawful manner it does protect him against the rendi-

tion of any judgment beyond what was contemplated and comprehended in the just and lawful exercise of that authority under the United States. Necessarily he invokes that authority as a *lawful* exercise of the power of the United States as a defense in his case, yet he is told by the supreme court of Missouri that because that was a *valid* proceeding from beginning to end it is not to be regarded as a Federal question. It is to be ignored, set aside, and a liability imposed upon an entirely different theory, because the party invoking the authority of the United States says it is a valid authority, and since the State court, in effect, decides that it is a meaningless exercise of power unless it is a void one, therefore there is no such Federal question presented as will justify an appeal to this court for a review of the decision of the State court. Such a position cannot be maintained.

In addition to the cases cited under point I of the original brief (page 16), the following other cases establish that it is not necessary to deny the validity of the authority invoked as a protection:

A Federal question is involved and presented in a case "where the marshal of the United States had levied an execution upon certain property under a judgment in the circuit court, which was taken out of his custody by a writ of replevin issued by a State court, and the supreme court of the State decided adversely to the claim of the marshal, and it is within the jurisdiction of this court to review the decision."

Clements *vs.* Berry, 11 How., 398.

"This court has jurisdiction in error over a judgment of the supreme court of Louisiana, in a suit by one citizen of

that State against another for the foreclosure of a mortgage on real estate therein, when the only controversy in the case is as to the effect to be given to a sale of the property under an order of the district court of the United States in bankruptcy, to sell the bankrupt's mortgaged property free from encumbrances."

Ins. Co. *vs.* Murphy, 111 U. S., 738.

A Federal question is involved which will give this court jurisdiction "whenever a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and of the parties."

Dupasseur *vs.* Rochereau, 21 Wall., 130.

Emboy *vs.* Palmer, 107 U. S., 3.

The decision of the highest court of a State upon a motion, accompanied by affidavits as proof, to perpetually enjoin the collection of a judgment obtained in a court of the State on the ground of the discharge of the defendant in bankruptcy, raises a Federal question which may be reviewed by this court.

Palmer *vs.* Hussey, 119 U. S., 96.

A suit prosecuted in the State courts to the highest court of such State against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper Federal court, presents a case for a writ of error to this court when the judgment is against the claim of the marshal.

Etheridge *vs.* Sperry, 139 U. S., 266.

Buck *vs.* Colbath, 3 Wall., 240.

Failure to give proper effect to the decree of the circuit court of the United States in a suit in a State court presents a question which is within the jurisdiction of this court to consider.

Cent. Nat. Bank *vs.* Stevens, 169 U. S., 432–456.

Even at the expense of repeating some things that are to be found in the original brief for the plaintiff in error in this case, I wish to answer, as briefly as I may, the further contention of the defendant in error to the effect that a Federal question was not raised. Here it should be noted that this contention is restricted very cautiously by counsel for defendant in error to what he has to say concerning the presentation of the question to the trial court. It is not claimed now that the question was not presented to and was not decided by the Kansas City court of appeals. I ask the court to consider what is said in the original brief concerning the meaning of the petition and the defense in this case. The allegations of the petition clearly bring before this court, as they must have brought before the circuit court of Cooper county, the proceeding in the United States court, the application for the injunction, the order of the court requiring the bond as a condition for granting the injunction, and the rules of law applied in Federal courts as indicating the proper measure of damages to be recovered under the obligation of that bond. In addition to the authorities heretofore cited as to what enters into and becomes a part of the bond, I cite the court to the case of Schuster *vs.* Weiss, 114 Mo., 158. That was a suit upon an appeal bond given on an appeal in a case appealed from the circuit court of the city of St. Louis, and dated May 31, 1884. That was

prior to the amendment of the constitution of 1884, creating the courts of appeals and changing the jurisdiction of the supreme court, which has been several times mentioned in this case. As the constitution then stood, the case was appealable to the St. Louis court of appeals, and the bond was conditioned that if the appellant should prosecute his appeal with due diligence to a decision in the St. Louis court of appeals, etc. Before the case was reached in that appellate court the constitutional amendment went into effect, and on the 4th of March, 1885, following, the legislature of the State passed a law providing for the transfer from the St. Louis court of appeals to the supreme court of all cases in which the supreme court would have jurisdiction by virtue of the amendment to the constitution. That being a case of that kind was duly certified to the supreme court, where subsequently the judgment was affirmed, and thereupon action was brought upon the appeal bond against certain of the sureties, who defended upon the ground that the law as it existed at the time the bond was made determined the obligations and liabilities of the parties, and since that law had been amended as it had been and the jurisdiction to hear the case had been taken from the St. Louis court of appeals, there was such change in the contract as released the sureties.

In disposing of that question the supreme court of Missouri said, beginning at page 173 of the report, as follows:

"While the legislature deprived the suitor of a hearing in the court of appeals, it at the same time secured him a hearing in the court of last resort in the State. But it is altogether a different proposition as to his sureties. They are not parties to the suit. They are obligors in a collateral undertaking. They entered into a private contract with

Mrs. Schuster and agreed to be bound on certain conditions. Over their contract was the protection of the constitution. *That contract was made with reference to the law as it then stood. In the light of that law it must be read.* After it was made it was secure from any act of the legislature or amendment to the constitution impairing its obligations (Gunn. *vs.* Barry, 15 Wall., 610; Waterworks Co. *vs.* Rivers, 115 U. S., 674; Black on Constitutional Prohibitions, sec. 4). * * * The bond was drawn *with reference to the form of procedure subsisting at the time.* They could not anticipate a different mode. * * * Our conclusion is that while the act of the legislature in question is constitutional and binding on the parties, that it impaired the obligation of those defendants (the sureties), imported new and different conditions into the bond, and hence worked a discharge of the defendants."

When the existing law and existing methods of procedure so enter into a contract in the form of an appeal bond as that any change in the law would release the sureties, as decided in the above case, it certainly is not going too far to say that the law and the rules of procedure existing and controlling in a Federal court, where an injunction bond is given, afford the proper guide for any court in which a suit upon that bond may be brought. To the same effect are Olcutt *vs.* Supervisors, 16 Wall., 690; Burgess *vs.* Seligman, 107 U. S., 20, and cases under point I, page 17, of original brief.

In Cox *vs.* The United States, 6 Pet., 172, a bond executed as at Washington city was sued on in the district court of the United States in the State of Louisiana, where the law of that State was applied in adjusting the liability of the sureties. For that reason the judgment was reversed, this court saying, at page 203 of the opinion:

"The general rule on this subject is well settled; that the law of the place where the contract is made, and not where

the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is governed according to the law of the place where it is to be executed. 2 Burr, 1077; 4 Term, 182; 7 Term, 242; 2 Johns., 241; 4 Johns., 285."

Likewise in Duncan *vs.* The United States, 7 Pet., 435, a bond to the United States was sued on in the district court of the United States in Louisiana. In that case the court refused to apply the law of Louisiana, and on writ of error by the defendant this court affirmed the judgment, holding (page 446) that although the bond was signed in New Orleans, yet "this, and all similar bonds, must be considered as having been executed at the seat of government of the United States, and to be governed by the principles of the common law." * * * (Page 449:) "This is an official bond, and was given in pursuance of a law of the United States. By this law the conditions of the bond were fixed, and also the manner in which its obligations should be enforced. It was delivered to the Treasury Department, at Washington, and to the Treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the Federal Government cannot be questioned. It has the power of prescribing, under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties, and in such cases the local law cannot affect the contract, as it is made with the Government, and in contemplation of law, at the place where its principal powers are exercised."

In Bank of U. S. *vs.* Donnally, 8 Pet., 361–372, Mr. Justice Story said:

"The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; or as it is compendiously expressed, by the *lex fori*."

Andrews *vs.* Pond, 13 Pet., 65, is to the same effect. There it was said (page 78):

"The defendants allege that the contract was not made with reference to the laws of either State (New York or Alabama) and was not intended to conform to either; that a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange, in order to evade the law. Now, if this defense is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of the kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus;* and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere, and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

In Scudder *vs.* Bank, 91 U. S., 406, it was held:

"Where a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the firm then in Chicago, the validity of such acceptance was to be determined by the law of Illinois."

In Liverpool Steam Co. *vs.* Phœnix Ins. Co., 129 U. S., 397–458, it was said:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

In Equitable Life Society *vs.* Clements, 140 U. S., 226, it was held, although a policy of insurance was formally dated and signed in New York by the company doing business in Missouri, upon an application made in Missouri and made part of the contract, and to take effect only upon payment of the first premium, which was paid in Missouri and the policy there delivered, that such policy was a contract made in Missouri, and therefore to be governed by the laws of that State.

This, in connection with what is said in the original brief, is submitted in support of our contention that the case so necessarily involved the authority exercised by the United States court and involved the proper construction of that authority and the law applicable at the time and place where the bond was made as to present a Federal question, and as to involve a determination of that question in any final adjudication that might be made in a suit upon such bond.

It is contended by counsel for defendant in error that the

answer did not say in terms that an authority under the United States was invoked; that it did not say in specific words that the law, as applied and administered in the United States courts, precluded attorneys' fees as damages upon an injunction bond; that it did not say in terms that in making such defense the defendant intended to present and raise a Federal question. The petition alleged the facts that necessarily involved the authority that had been exercised by the United States court, and as a logical consequence presented every question of law necessary for a proper judgment upon the facts thus alleged, and likewise the answer, although it was a general denial, put in issue everything essential to the plaintiff's case. Even if the practice which prevailed in Missouri some years ago was still in vogue and special denials were required, there would have been no more specific mention of the Federal question than there is in the answer as it was filed in this case. It is not necessary to plead the law. If it had been attempted it would have been bad pleading. What more, I ask, could the defendant in that case, observing the rules of pleading, have said? Would it have been proper to say, after admitting those things which were admitted and denying the other allegations of the petition, either generally or specifically, to have gone on and by way of further defense set up the law as it was administered in the Federal courts? Or would it have been expected that in the answer the defendant would have said that this defense, which denies the right to recover, that the plaintiff has alleged in his petition, is invoking an immunity under the law, as it is applied in the exercise of the authority of the Federal courts, or that, by making this de-

fense, the defendant now raises a Federal question in this case? Certainly, any such statement in the answer would have been condemned as bad pleading, and, so far as pleading is concerned, it would have been regarded as surplusage. To have made any such statement in the answer would have been stating simply a legal conclusion, and that legal conclusion is as much involved in the allegations of the petition and in the admissions and denials of the answer as if specifically stated. I submit there is nothing in that contention of the defendant in error. True, there were other defenses, as is contended, but certainly it does not cut out a Federal question which arises under one defense in the case, because there may be other defenses which do not involve the Federal question, unless the decision of the case was finally and conclusively reached upon some other question.

As already suggested, in the case at bar none of the other defenses, if decided in favor of the plaintiff, could eliminate the defense which rested upon the authority of the United States court. Every other one of the defenses might have been decided in favor of the plaintiff, and yet he could not have recovered, unless the court also decided in his favor upon this particular defense. The very fact, therefore, that the judgment was for the plaintiff is conclusive proof that this question arising out of the rules governing the exercise of authority by the United States court was decided, and decided adversely to the defendant, plaintiff in error here, and, if decided, then it must have been set up and claimed. It is said, farther, there were no instructions asked which called for a ruling of the court upon this question. Since a ruling favorable to the defendant

would have necessitated a judgment in its favor, manifestly the request for a peremptory instruction brought that question clearly before the court as a matter essential to the plaintiff's case. While it is true that some of the instructions prayed by the defendant were directed to the other defenses, yet there is no other defense in the case to which the second instruction prayed by the defendant (Record, p. 37) can be ascribed, except this one which we contend presents the Federal question. There the court was asked to declare the law as follows:

"The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on, any sum which he may have paid out or become liable for as attorneys' fees."

That had but one meaning and could have but one application, and that meaning and application are just as plain and just as certain as they would be if the defendant had added to the instruction some such reason as this:

"Because the law, as applied in United States courts, entered into and became a part of the bond sued upon, and because such law does not authorize a recovery of attorneys' fees on such bond, and this reason is presented as a claim of immunity under the authority of the United States, and therefore presents a Federal question."

While it would have seemed absurd to make such an addition to the instruction, yet that is the principle upon which it is based and which was necessarily brought to the mind of the trial judge when he refused that request. Counsel is careful not to say that the question was not considered by the lower court, but simply that the form in which the record is made up does not on its face disclose it; nor could such a statement be made, for it is known that in

the trial court the cases of Bein *vs.* Heath and Oelrichs *vs.* Spain from this court were relied upon by the defendant, while the case of Walsh *vs.* Lackland, 8 M. A., 122, was relied upon by the plaintiff and was adopted by the trial court as the basis of its ruling. But probably all this discussion is unnecessary, since there is no contention by the defendant that the question was not presented to and decided by the Kansas City court of appeals, nor is any answer attempted to what is said upon this subject at pages 79 to 82 of the original brief, by which we attempted and think we successfully established that the court of appeals understood that the question was in the case, and, without questioning or criticising the manner in which it had been brought in or whether it had been presented in time, the court, acting upon the questions presented by the briefs of counsel in that court, stated the contention of the appellant there (plaintiff in error here), and then proceeded to discuss and adjudicate that question, and decided it adversely to this plaintiff in error (Record, pp. 66 and 68). Since the question was presented to the court of appeals, and since that court entertained the question, considered it, and decided it, and since that was the highest court of the State in which a decision could be had, under the rulings of both that court and the supreme court of the State, it is sufficient for the purpose of having the case reviewed in this court.

Concerning the time and manner of presenting the Federal question, I submit the following cases, in addition to those cited in the original brief:

In Davis *vs.* Packard, 6 Pet., 41, the claim of immunity from suit in the State court because the defendant was con-

sul general to the King of Saxony was made for the first time in the court of errors of the State of New York. A motion to dismiss the writ of error was filed in the Supreme Court of the United States on the express ground that the claim was not made in time to be considered matter of record in the case for the purpose of conferring jurisdiction for a review of the judgment of the court of errors, as the highest court in the State of New York. The motion was denied, the court stating in the opinion:

"It has also been settled that in order to give jurisdiction to this court under the twenty-fifth section of the judiciary act, it is not necessary that the record should state in terms that an act of Congress was in point of fact drawn in question. It is sufficient if it appears from the record that an act of Congress was applicable to the case, and was misconstrued, or the decision in the State court was against the privilege or exemption specially set up under such statute. How stands the record, then, in this case? Charles A. Davis alleges that he is consul general of the King of Saxony in the United States, and that he is thereby privileged from being sued in the State court, according to the Constitution and laws of the United States. The fact of his being such consul is not denied by the joinder in error. The answer given is, that it nowhere appears by the record, proceedings or judgment of the supreme court (the trial court), that the said Davis was such consul; and the court of errors, in giving judgment, say, after having examined and fully understood the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of Congress, which declares that the district court of the United States shall have jurisdiction, exclusively of the courts of the several States, of all suits against consuls and vice-consuls.

"The question before this court is not whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors, that is to be reviewed here. That is the final judgment in the highest court in the State, and none other can be brought

into this court, under the twenty-fifth section of the judiciary act.

"Whether it was competent for Davis in the court of errors to assign, as error in fact, his exemption from being sued in a State court, is not a question presented by the record. No such question appears to have been raised or decided by the court. And, judging from the ordinary course of judicial proceedings in such cases, we are warranted in inferring that no such question could have been made. * * * From the record, then, we are necessarily left to conclude, that the State court, assuming or admitting the fact that Davis was consul general, as alleged in his assignment of errors, yet it did not exempt him from being sued in a State court; which brings the case within the twenty-fifth section of the judiciary act; the decision having been against the exemption set up and claimed under a statute of the United States. The motion to dismiss the writ of error is accordingly denied."

In Armstrong *vs.* Treasurer of Athens County, 16 Pet., 281, the jurisdiction of this court was sustained, although the record did not disclose that the Federal question had been directly raised at any stage of the proceeding. After stating that it must be shown by the record that the point was made, "either by express averment or by necessary intendment, in the pleadings in the case," and after stating that there was a certificate from the presiding judge of the supreme court of Ohio, this court said:

"We presume that the certificate of the presiding judge was made by authority of the court; and as this bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise and was decided, the case comes within the fourth clause above mentioned, and this court must take jurisdiction and examine whether the point so certified was rightfully decided."

In the case at bar the petition and answer "show that such a point might have arisen" in this case, while the

opinion of the Kansas City court of appeals, more clearly and more conclusively than the certificate from the Ohio court, shows that it actually did arise and was decided adversely to this plaintiff in error.

In Water Power Co. *vs.* Canal Co., 142 U. S., 254–269, this court said:

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State court (Willson *vs.* Blackbird Creek Marsh Co., 2 Pet., 245; Armstrong *vs.* Athens County, 16 Pet., 281; Chicago Life Insurance Co. *vs.* Needles, 113 U. S., 574; Eureka Lake Co. *vs.* Yuba County, 116 U. S., 410)."

The rule is stated in Morrison *vs.* Watson, 154 U. S., 111–115, as follows:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law of the State, as declared by its highest court, could not be considered by that court; *or if it was not claimed in any form before judgment in the highest court of the State*, it cannot be asserted in this court."

In Tregea *vs.* Modesta Irrigation District, 164 U. S., 179–184, it was said:

"A motion was made to dismiss this case on the ground of the lack of a Federal question. It appears from the opinion of the supreme court of the State that the defendant contended before it that the attempt to bind the reconstituted district by a vote of the district prior to such exclusion in respect to the issue of bonds was in violation of section 10, article I of the Constitution of the United States; and that it overruled and denied such contention. So there was considered by the supreme court of the State the distinct question of an alleged conflict between the proceedings confirmed by the decree of the lower court and rights claimed under the Constitution of the United States, and the decision was against those rights.

"Further the real contention of the defendant was and is that the operation of this statute is to deprive him of property without due process of law.

"The burden of his case from the first has rested on the alleged conflict between proceedings had under the irrigation statute and the Federal Constitution; so that beyond express declaration in the opinion of the supreme court of the State we may look to the real matter in dispute, and these unite in forbidding us to say that no Federal question was presented. The motion to dismiss on that ground must be overruled."

In Central Nat'l Bank *vs.* Stevens, 169 U. S., 432–456, the jurisdiction of this court to review the judgment of the highest court of a State was sustained on the presentation of the Federal question ponu assignments of error in such State court.

Even if there had been no such question raised in the trial court, it could, under the practice in Missouri, have been raised for the first time in the appellate court.

That a petition does not state facts constituting a cause of

In addition to the cases previously cited, I ask attention o the following:

Huntington *vs.* Attrill, 146 U. S., 657, was error to the court of appeals of Maryland. The bill in that case alleged he recovery of a judgment in New York against the defendant n account of a false certificate made by him as a director of a New York corporation, by reason of which he became liable nder the New York statute for the debts of the corporation. The bill was demurred to on the ground that it appeared hat the recovery was of a penalty under the New York tatute. This was all that appeared as to the facts or the aw applicable thereto or as to any claim under any law of he United States.

The demurrer was overruled in the trial court, and on ppeal the court of appeals reversed the judgment, holding hat the courts of Maryland would not enforce a judgment f New York for a penalty. A writ of error was sued out rom this court, and the jurisdiction was sustained and the dgment of the State court reversed. On page 666 the ourt said:

"It thus appears that the judgment recovered in New ork, was made the foremost ground of the bill, was fully iscussed and distinctly passed upon by the majority of the ourt of appeals of Maryland, and was the only subject of he dissenting opinion; and that the court without conidering whether (other reasons might entitle plaintiff to ave certain transfers of property annulled) declined to aintain his right to do so by virtue of that judgment nply because the judgment had, as the court held, been covered in another State in an action for a penalty.

"The question whether due faith and credit were thereby enied to the judgment rendered in another State is a Fedal question of which this court has jurisdiction on this rit of error. Green *vs.* Van Buskirk, 5 Wall., 307, 311; apo *vs.* Kelly, 16 Wall., 610, 619; Dupasseur *vs.* Rocheau, 21 Wall., 130, 134; Crescent City Co. *vs.* Butchers' nion, 120 U. S., 141, 146, 147; Cole *vs.* Cunningham, 133 S., 107; Carpenter *vs.* Strange, 141 U. S., 87, 103."

In Marchant *vs.* Pa. R. R., 153 U. S., 380, the facts upon which the Federal question was based did not appear in the record, nor did it appear that there was any claim under the United States Constitution prior to the assignments of error in this court, and yet the court entertained the case, and, having fully considered the question, affirmed the judgment of the State court instead of dismissing the writ of error.

Scott *vs.* McNeal, 154 U. S., 34, was in error to the supreme court of the State of Washington. That was an action of ejectment. On the trial defendant relied on an administrator's deed, and when the same was offered in evidence the plaintiff objected to it and to the proceedings in the probate court on the ground that they were void, because there could be no valid administration on the estate of a *live* man, and the probate court had no jurisdiction to make the orders in question. This objection was overruled and judgment entered for defendant.

Nothing farther appears from the record to have been done in the trial court.

No claim was made in that court of any constitutional right or protection whatever. An appeal was taken to the supreme court of the State.

"In that (the supreme) court, it was argued in his (appellant's) behalf 'that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law.' But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. St., 309."

This is the only statement in the report of the case intimating that there might be a Federal question in the case, and that only occurred when the case was presented to the appellate court. It was contended that the record did not properly present a Federal question. Without specially noticing that objection, the court entertained jurisdiction and proceeded to a full consideration of the case and reversed the judgment of the State court.

action may be raised for the first time in the appellate court in Missouri.

Smith *vs.* Burnes, 106 Mo., 94.
Lilly *vs.* Menke, 126 Mo., 190–211.
Benham *vs.* B'ld'g Co., 60 M. A., 34.
Childs *vs.* R. R., 117 Mo., 414–426.
McPeak *vs.* R. R., 128 Mo., 617–635.

The petition in the case at bar comes clearly within the rule of the above cases, because not only does it not state a cause of action, but it states facts which conclusively establish that the plaintiff was not under the law entitled to recover, as attempted in this case.

The rule of law arising from the exercise of authority by the United States court to be applied to the allegations of the petition precludes the right of recovery on the facts stated

Since it was in time under the State practice to first raise the question in the court of appeals; since it is not disputed that it was raised in that court, and since when raised in that court it unmistakably claimed immunity from liability by virtue of the authority exercised by the United States court, there can be no logical ground of opposition to the contention of plaintiff in error, regardless of what may be said or claimed relative to any other feature of the case.

The defendant in error proceeds farther in paragraph III of his brief to argue that notwithstanding the rule laid down by this court and followed and applied in the United States circuit courts, yet it was entirely proper for the State court to ignore that rule and permit a recovery for attorneys' fees in this case. This argument consists

largely in an extended extract from the case of Aiken *vs.* Leathers, from the State of Louisiana. As was remarked in our original brief, that case was an argument to show why the rule ought to be otherwise than held by this court concerning attorneys' fees in such cases; but even if that argument was sufficient to convince this court that it ought to change its ruling, it could have no bearing upon this case, because, under the authorities cited, it is the duty of every court to hold that the law in force at the time and at the place and in the jurisdiction when and where the bond was executed is to be considered as imported into the bond and constituting a part of its terms and conditions; but the case of Aiken *vs.* Leathers is based largely upon a misconception of the case of Meyers *vs.* Block, decided by this court and reported in 120 U. S., 106. It is true that in Meyers *vs.* Block this court distinguished between that case and Bein *vs.* Heath, and to a certain extent modified the ruling of the latter case; but there were two propositions involved in Bein *vs.* Heath. First, that attorneys' fees were not properly to be considered as an element of damages upon an injunction bond given in the United States court, and that it would constitute manifest error to subject the parties to an action upon such bond to the laws of the State; and, second, that no action could be maintained upon such bond conditioned for payment of such damages as might be *adjudged* against the principal, unless there had *previously* been an adjudication of such damages. It was to this second proposition that the case of Meyers *vs.* Block was addressed. It did not pretend to review the decisions of this court, holding that attorneys' fees were not a proper element of damages

on such bond. The opinion will be searched in vain for any statement to justify that assumption. It does not appear of what the damages consisted in Meyers *vs.* Block. There were certain laws of the State of Louisiana which were involved in the decision of the case, but which did not in themselves relate to attorneys' fees, and it was of those other laws that the assignment of error spoke when in the first paragraph it was said the supreme court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in and by order of a Federal court. As suggested in the previous brief, the only basis for the jurisdiction of this court was the fact that the bond, having been given in a suit in the Federal court, involved the exercise of authority under the United States, and it therefore presented a Federal question, and upon that presentation of the question, much more vague than in the case at bar, the court entertained jurisdiction and then affirmed the judgment on the theory of the distinction that was made between that case and Bein *vs.* Heath, not, however, by virtue of the law of Louisiana, but by reason of the changes of practice in the Federal courts, and partly by reason of a different view which this court entertained as the correct interpretation to be put upon the condition of the bond, namely, the payment of such "damages as he may *recover* in case it should be decided that the injunction was wrongfully issued." When properly understood, Meyers *vs.* Block is no authority at all upon the merits of the Federal question involved in this case, namely, that attorneys' fees cannot be recovered upon such injunction bond, while it is a direct authority in favor of the plaintiff

in error that a suit upon an injunction bond given in the Federal court involves a Federal question and presents it in such manner and at such time as to justify a review of the case by this court. In addition to the cases previously considered in our former brief, namely, Aiken *vs.* Leathers (La.), 3 Southern Rep., 357; R. R. *vs.* Shephard, 1 Mo., 254; Walsh *vs.* Lackland, 8 M. A., 122, and Mitchell *vs.* Hawley (Cal.), 1 Pac. Rep., 833, counsel for defendant in error cites 1 Spelling on Extraordinary Legal Remedies, sec. 954; R'y Co. *vs.* Brown (Ky.), 36 S. W. Rep., 555; Corcoran *vs.* Judson, 24 N. Y., 106, and R'y Co. *vs.* Smith, 154 Mo., 300. I respectfully direct the court to what was said in the former brief concerning the first four of these cases, and with reference to the others submit that in so far as the case of Railway Co. *vs.* Smith, 154 Mo., 300, is concerned, it adds nothing by way of reason or logic to the cases criticised in the former brief, for the reason that it simply cites them and quotes the extract which I think we have shown to be wholly unsound. And so Spelling on Extraordinary Legal Remedies simply says, "While counsel fees are not recoverable on injunction bonds in the Federal courts, yet that fact does not preclude recovery of such damages in an action in a State court on an injunction bond given in a United States court," and then cites several of the cases mentioned above. It will be noticed that the author deals with this as a "fact," and loses sight of the real fact, namely, that what accomplishes the condition is a rule of law, which of necessity must have entered into the contract; and when we turn to the decisions cited by that author, and which are adopted by counsel for defendant in error, we find that

the case of Corcoran *vs.* Judson, 24 N. Y., —, has no bearing whatever upon the subject. While it is true that attorneys' fees were allowed in that case, yet it was not a bond in an injunction suit, nor given in a case pending in a United States court, but was a bond given pursuant to an act of Congress, with reference to a claim made under the treaty between the United States and Mexico, and as a preliminary to instituting a suit for an injunction.

Moreover, it does not appear, and was not claimed, that there was any rule of law in force or applied in any jurisdiction which precluded attorneys' fees as damages upon such bond, and, still farther, if we were to treat this as entirely parallel with the bond sued on in this case, we would find that no such point was made as is now made in the case at bar.

In the case of Railway against Brown, from Kentucky, reported in 36 S. W. Rep., there is no similarity at all with the case at bar, outside of the fact that the bond sued on had been given in the United States court. The only point decided was that a State court could entertain jurisdiction of an action upon such bond. In this respect I submit that there is no case which has been cited by defendant in error that suggests any logical reason for applying the rules applicable to bonds given in State courts as the proper guide for measuring damages upon bonds given in the Federal courts, when it is conceded that a different rule prevails in the Federal courts. It is recognized everywhere that a chancellor has the right to impose the terms on which he will grant an injunction. There is no question but that Judge Philips, when he granted the injunction in the United States court, and required the bond sued upon in this case, might have

specified the damages that were to be recovered upon the bond in the event of a breach, and he might have said that in the event of a dissolution of the injunction the principal and sureties on that bond should pay to the opposing party all damages that might occur by reason of the injunction, but that it was understood that no attorneys' fees were to be included in any estimate to be made of such damages. What else can be fairly deduced in this case except that that is just what the honorable judge meant when he required this bond to be given? Unquestionably he was exacting that bond with reference to the rules of law and practice governing in his court. He was not sitting upon that bench to apply and enforce the law in accordance with the rulings of this court and then require obligations from litigants in his court involving some liability to be determined by rules of law that would be ignored in his court and in this court. He was not to be understood as importing into a contract, which he required to be made, and which when made he approved, either directly or through an officer of his court, rules of law which he repudiated as a judge, nor was he to be considered as adopting a measure of damages which that court and this court would say is not correct. If he had intended to depart from the rule as laid down, and the law as applied in the Federal courts, he certainly would have said so, and, not having said so, the only presumption that can be indulged is that, exercising the authority of a judge of the United States court, administering the law in accordance with the decisions of the highest tribunal having control over United States courts, he intended that the parties should make the bond with reference to that law

and should assume a liability only to the extent that the Federal courts declare to be the proper measure of damages in such case. I submit that there is nothing presented in the brief for the defendant in error which justifies an affirmance of the judgment of the Kansas City court of appeals. On the contrary, the points there made only emphasize the reasons why this court should now reverse the judgment of that court, because there was presented and decided in the case, as submitted to that court, a Federal question, and because that decision was adverse to the plaintiff in error, and because without that adverse decision there could have been no judgment whatever against the plaintiff in error.

For these various reasons I submit the judgment must be reversed.

GEO. P. B. JACKSON,
For Plaintiff in Error.

18.

No. 148.

Brf. of Williams for D.E.

Office Supreme Court U.S.
FILED
JAN 17 1902
Clerk.

Filed Jan. 17, 1902.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1901.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOHN S. ELLIOTT,
Defendant in Error.

No. 148.

In Error to the Kansas City Court of Appeals, in the State of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

WM. M. WILLIAMS,
For Defendant in Error.

MISSOURI DEMOCRAT PRINT.

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No. 148.

In Error to the Kansas City Court of Appeals, in the State of Missouri.

STATEMENT OF DEFENDANT IN ERROR.

This suit originated in the Circuit Court of Cooper County, in the State of Missouri. It is an action by Elliott against the Railway company, upon

a bond given by it, to obtain a temporary injunction in a certain proceeding in the Circuit Court of the United States for the Western District of Missouri.

Elliott brought a suit at law against the Railway company to recover a large amount of money alleged to be due him for railway ties furnished to and accepted by said company under a written contract between them. While this suit was pending in the United States Circuit Court for the Western District of Missouri, the Railway company filed a bill upon the Equity side of the court, seeking to enjoin Elliott from the further prosecution of said action at law, and asking certain other equitable relief.

The court, as a condition precedent to granting the temporary injunction, required the Railway company to enter into a bond to Elliott in the sum of twenty thousand dollars. This was done and the bond duly executed in the following form:

"INJUNCTION BOND.

"Know all men by these presents; that the undersigned, the Missouri, Kansas and Texas Railway company, a corporation, as principal, and E. C. Simmons, of St. Louis, Mo., and Wm. Nichols, Mo., as sureties are held and firmly bound unto John S. Elliott in the sum of twenty thousand dollars, to the payment whereof we bind ourselves, our successors, heirs and administrators, firmly by these presents.

Signed and sealed this 29th day of November, 1893."

The condition of the above bond is as follows, to-wit:

Whereas, the above-bounden principal, the Missouri, Kansas and Texas Railway Company, in a suit in equity instituted by it against the said John S. Elliott, in the Circuit Court of the United States

for the central division of the western district of Missouri, and which is numbered 2092 in said court, has applied for and obtained a temporary injunction, the nature and purpose of which said temporary injunction is to restrain the prosecution of an action at law, in which the said John S. Elliott is plaintiff and the said Missouri, Kansas-Railway company is defendant, now pending in the above named court and under the number 2082.

Now, if the said Missouri, Kansas and Texas Railway Company, will abide the decision which may be made in said case, number 2092, and upon said injunction and shall pay all sums of money, damages and costs that shall be adjudged against it if the said temporary injunction shall be dissolved, then this obligation will be void, otherwise to remain in full force and effect.

The Missouri, Kansas and Texas Railway Company,

By THOS. C. PURDY, [SEAL.]
Vice-President and General Manager.
W. NICHOLS, [SEAL.]
E. C. SIMMONS, [SEAL.]

The issues in the equity suit were referred to a master, and, upon the coming in of his report, exceptions thereto filed by the Railway company were sustained, and the injunction made perpetual. Elliott appealed.

The decree of the Circuit Court was reversed by the U. S. Circuit Court of Appeals of the Eighth Circuit, and the case remanded. The Circuit Court of the United States, on the 19th day of October, 1896, in accordance with the mandate of the U. S. Circuit Court of Appeals "ordered and adjudged that the injunction heretofore granted in this

cause be and the same is hereby dissolved," and further that the bill be dismissed, with costs.

Elliott, thereafter, brought this suit upon the injunction bond, at the October term, 1897, of the Circuit Court of Cooper County, in the State of Missouri, to recover the damages sustained by him in consequence of the temporary injunction.

The petition, as it is called in the Missouri practice, alleges the execution of the bond, and for breach thereof assigns that "said temporary injunction was dissolved, and that plaintiff in and about the procuring of the dissolution of said injunction was put to great trouble and expense, and necessarily laid out and expended large sums of money, and incurred liabilities; that he was compelled to spend a great deal of time in procuring and presenting evidence to secure the dissolution of said injunction, and employed attorneys to represent him in said matter, and incurred other liabilites on account thereof; that his personal expenses in traveling from place to place where the evidence was taken in reference to said injunction, in support of the application therefor, and in going to and returning from the place of trial, were about two hundred dollars, and that the reasonable value of the services of plaintiff's attorneys in said matter, incurred by plaintiff, was eighteen hundred dollars, and that plaintiff has sustained damages in the sum of two thousand dollars, and that said defendant has failed to pay the same, or any part thereof." Plaintiff asked judgment for the penalty of the bond, and that execution issue for two thousand dollars, the damages claimed, and costs.

The answer admits the incorporation of the Railway company, and that a temporary injunction was granted at its instance by the Court Circuit of the United States to prevent the prosecution by Elliott of

the action at law pending against it, and also admits the execution of the bond, and alleges that the granting of the injunction was merely an incident to the suit instituted for the main and principal purpose of cancelling and annulling a certain report of the inspection of ties; and that all these proceedings were necessary to enable the defendant to make its defense in the United States Circuit Court to the action at law instituted by plaintiff against it. All the other allegations of the petition are denied by the answer.

The case came on for trial before the court without a jury. Elliott introduced evidence tending to show that he had sustained damages to the amount of two thousand dollars, including the attorneys' fees incurred by him in securing a dissolution of the temporary injunction.

The Railway company did not by its answer; by any objection to the introduction of evidence; or by the declarations of law asked by it, invoke any defense against the allowance of counsel fees, based upon the rules of practice or decision in the Federal Courts. No Federal question was attempted to be raised by the pleadings; by the objections to the testimony; or by the declarations of law in the trial court.

The cross examination of Mr. Cosgrove, the witness in behalf of Elliott in regard to counsel fees, was directed entirely to an effort to show that he had included in his estimate of such fees services rendered, not merely to secure a dissolution of the injunction but for the trial of the case.

The court was asked to declare the law to be that under the pleadings and evidence plaintiff was not entitled to recover; and further that he was not entitled to recover as damages on the injunction bond any sum he may have paid out or become liable for as attorneys' fees. The attention of the trial court was not specially directed by the pleadings, or by any ob-

jections to the introduction of evidence, or by the declarations of law asked by the Railway company, to the claim now attempted to be set up—that no attorneys' fees could be allowed in a suit upon the bond in the State Court, because such an allowance would not be made in the Federal Court where the bond was given.

The record does not show that the attention of the trial court was called to any title, right, privilege or immunity claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States. So far as the record goes, every claim or defense made by the Railway company in the trial court may have been based upon the rules of practice and decision in the local courts. There is nothing to show that any right, immunity or privilege under the laws of the United States, or the practice in the courts thereof, was set up. There is certainly no *express* reference to any such claim in anything done or said in the trial court, as contained in the record.

Judgement was rendered by the Circuit Court of Cooper County for the penalty of the bond, and the damages assessed at two thousand dollars, and execution awarded for that amount.

The Constitution of the state of Missouri, in fixing the jurisdiction of the Supreme Court and of the Courts of Appeals, provides among other things that the Supreme Court shall have cognizance of all appeals "in cases involving the construction of the Constitution of the United States, or of this State; in cases where the validity of a treaty, or statute, or authority exercised under the United States is drawn in question."

The Railway company, notwithstandings its present claim, applied for and was granted an appeal to the Kansas City Court of Appeals. The case was

submitted to that court, and a decision rendered affirming the judgment of the trial court. The Railway company then made an objection to the jurisdiction of the court of appeals, on the ground, among others, that a Federal question was involved in the record, and made an application for a re-hearing and to transfer the case to the Supreme Court. This was overruled.

The Railway company then applied to the Supreme Court of the State of Missouri for a writ of prohibition, directed to the Kansas City Court of Appeals, on the ground that the case was not within the jurisdiction of the latter. This writ was denied. The court, in the opinion rendered upon this application, said:

"To us the contention of relator does not seem tenable. We fail to discover from the record anywhere how, 'the validity of a treaty, or statute of, or authority exercised under the United States is drawn in question,' or that a Federal question may be said to be involved in the case. In fact, both the petition and the answer in the case before the trial court recognized the validity of the bond, and the action of the Federal Court in all its orders regarding or affecting the same."

"That a Federal question could have been raised is not denied; but that such a question was not raised is most manifest. If no challenge of authority exercised under the United States is in fact made by the record, the mere assertion of its existance by counsel, coupled with the further fact that such a question might have been made under a proper answer, or by the development of a proper state of facts during the progress of the trial, will not suffice to deprive the Kansas City Court of Appeals of its jurisdiction to hear and determine upon the case as it reached that

court, or to invest this court with jurisdiction thereof."

The opinion of the Supreme Court of the State of Missouri upon the application for a writ of prohibition is published in 154 Mo., page 300.

The Railway company then applied for and obtained a writ of error from this court, directed to the Kansas City Court of Appeals.

ARGUMENT OF DEFENDANT IN ERROR.

I

The Railway company, in the trial court, did not specially *set up or claim* any exemption from liability for attorneys' fees, on account of any right, privilege or immunity under the Constitution or laws of the United States, or any such exemption by reason of any authority exercised under the United States. The question now sought to be raised was not presented to the Missouri courts in the manner required by the practice and procedure therein. The answer does not claim any such immunity, and does not rely upon any right, privilege or immunity under the laws of the United States. No objection was made upon *that ground* to the introduction of evidence concerning counsel fees. The declarations of law asked do not refer to any such right, privilege, immunity or exemption. The trial court may well have understood the declarations of law asked to be based upon the practice in the local courts in Missouri. In fact the Railway company insisted that upon the evidence submitted to the trial court, it was not liable for counsel fees under the rules prevailing in the Missouri courts.

Missouri, Kansas & Texas Railway Co. vs. Smith 154 Mo. loc. cit. 312, et seq.

White Live Stock Commission Company vs. Chicago, Millwaukee & St. Paul Railway Co., 157 Mo. 518.

Parlin & Orendorf Co. vs. Hord, 145 Mo. 117.

The Federal question relied upon, to justify a review here of the judgment of the State court, must have been presented to and *passed upon* by the highest court of the state in which a decision in the suit could be had.

The proper method of raising such question must be determined by the rules of practice in the State Courts.

The Constitution of Missouri confers upon the Supreme Court of that State exclusive jurisdiction of all appeals in cases involving the construction of the Constitution of the United States and of that State, and of all cases involving a Federal question. The Kansas City Court of Appeals has no jurisdiction to pass upon or determine any such question, and cannot do so. When a case presenting an issue of that kind is taken to the Court of Appeals, it must be transferred to the Supreme Court for adjudication. It is absolutely beyond the jurisdiction of the Kansas City Court of Appeals to entertain or determine a case involving a Federal question.

The appellate courts must decide the cases presented to them upon the same theory upon which they are tried in the courts of original jurisdiction. Hence it is, that a party relying upon a right under the Federal or State constitution, or desiring to present a Federal question, which, on appeal, the Supreme Court alone can pass upon, must directly present such question to the Trial Court; and the

record must show that this was done, otherwise, it cannot be considered when the case reaches the higher court on appeal. Unless the record expressly shows that the question has been submitted to and passed upon by the lower court, *it must be ignored upon appeal.* The case must be decided by the Court of Appeals, as though such point had never been made or suggested. Such question is not in the case and cannot be injected into it for the first time when it reaches the Court of Appeals.

Plaintiff in error says, on page 18 of its brief:

"Under the decisions and 'Code of Civil Procedure,' of the State of Missouri (Laws of Missouri, 1889, pp. 296-304,) the briefs filed in the Kansas City Court of Appeals became a part of the Record in the case, and may properly be resorted to to ascertain what questions were presented for determination. The briefs of counsel on both sides filed in that court clearly show that the Federal question previously mentioned was distinctly presented, and the immunity claimed by the appellant and resisted by the respondent."

The Supreme Court of Missouri, however, has declared:

"A constitutional question cannot be injected into a case by the briefs and argument of counsel."

"For jurisdiction we must look to the record, and not to the briefs of counsel, and unless the record shows that a question involving the construction of the constitution was fairly and directly raised and passed upon in the Trial Court, this court has no jurisdiction on that ground."

Town of Kirkwood vs. Johnson 148. Mo., 632.

"It has frequently been decided that to give this court Appellate Jurisdiction on the ground that the

case involves the construction of the constitution of the state, the record must show that the point was raised in the trial court and the protection of the constitution claimed by the losing party was denied him. [Parlin and Orendorff Co. vs. Hord 145 Mo. l. c. 119. Hulett vs. Railroad 145 Mo. 35. James vs. Ins. Co. 148 Mo., l. c. 18] And this same is true as to Federal questions."

Shewalter vs. Mo. Pac. Ry Co. 152 Mo. loc. cit. 557.

"If we regard the recitals of the bill of exceptions and those of the record proper as of equal dignity (Douglass vs. Orr, 58 Mo. 573), still no constitutional question can be said to have been properly raised in this case, for only from the briefs of counsel filed in this court are we informed that the question of the constitutionality of the act of 1891 was the basis of the judgment of the Circuit Court, and as we have uniformly held, this does not raise such a question at the proper time and in the proper manner."

Parlin & Orendorff Co. v. Hord, 145 Mo. loc. cit. 119.

The latest utterance of the Supreme Court of Missouri upon the subject is contained in the opinion of Marshall J. in Clark vs. Porter 162 Mo. loc. cit. 523.

"In order to give this court appellate jurisdiction on the ground that the case involves the construction of the Constitution of the United States, it must affirmatively appear from the record that the protection of the Federal Constitution was invoked in the trial court and denied by that court to the losing party before that forum. [Vaughn vs. Railroad 145 loc. cit. 61. Shewalter vs. Railroad 152 Mo. l. c. 551] The record in this case nowhere

shows a compliance with this rule. The Federal constitution was not relied upon, invoked or referred to in the pleading or instructions or in any proceedings in the Circuit Court by the parties, the attorneys, or the Court, nor was any protection afforded by that instrument denied to either party by that court. Cases must be tried in the Appellate Courts on the issues raised and decided in the trial courts." "No Federal right is involved in the decision of this question—Hence this court has no jurisdiction of the cause—For these reasons this case is remanded to the St. Louis Court of Appeals."

It was not sent to the Court of Appeals for that court to decide the Federal question attempted to be injected into the case upon appeal, because the Court of Appeals has no jurisdiction to determine any such question, but to decide the case upon the other issues, as though such Federal question had not been mentioned. Can this court review the judgment of a State Court disposing of a case without reference to any Federal question, and where such State Court has no jurisdiction to hear or decide such Federal question, if properly raised on the record?

There is nothing in the record to show that the Railway company claimed in the trial court immunity from counsel fees on account of the practice of the Federal Courts with reference to such fees in assessment of damages on injunction bonds.

The declarations of law do not set up any such claim. The court was asked to declare the law to be that under the pleadings and evidence the plaintiff was not entitled to recover, and the finding must be for defendant. How could the trial court say that this declaration of law was intended to raise any Federal question? The Railway company admits that

one of its defenses was that plaintiff was not entitled to recover at all, because the damages were not assessed at the time of the dissolution of the injunction. The trial court may well have understood that this decision of law was intended to present for its decision that proposition.

The court was also asked to declare that plaintiff was not entitled to recover as damages on the injunction bond any sum which he may have advanced or become liable for as attorneys' fees. The Railway company contended that the attorneys' fees could not be recovered under the practice in the Missouri courts because they were not incurred in securing a dissolution of the injunction, but also for defending the Equity suit in all its branches. These declarations of law cannot be said to have brought directly to the attention of the trial court any right or immunity under the Federal law, or the practice in the Federal Courts.

When the case was decided against defendant in the Circuit Court of Cooper county, the Railway company took an appeal to to the Kansas City Court of Appeals. No objection was made by the company to the jurisdiction of that court until after an adverse decision there. The Court of Appeals was then asked for the first time to transfer the case to the Supreme Court.

An application was subsequently made to the Supreme Court of Missouri for a writ of prohibition against the Kansas City Court of Appeals.

The Supreme Court of Missouri held that, while a Federal question might have been raised in the case the Railway company had not done so, and the record did not present any such question for decision. The Kansas City Court of Appeals had jurisdiction—not to decide a Federal question, but to decide the case, ignoring any Federal question that might have

raised but which was not so raised. No appellate been court in Missouri, upon the record in this case, had a right, under the decisions of the Supreme Court of that state, to pass upon or consider any Federal question, because such question does not appear from the record to have been passed upon by the trial court The Supreme Court, in denying the writ of prohibitino, said:

"That a Federal question could have been raised is not denied, but that such a question was not raised is most manifest."

It cannot, therefore, be said that there has been any decision by the highest court of the state against any title, right, privilege or immunity specially set up or claimed under the Constitution or laws of the United States. The Supreme Court of Missouri has simply said that there was no such question involved in this record, and therefore it could not be passed upon, and that the case was to be determined by the Court of Appeals as though no such question had been suggested.

Plaintiff in error contends that if the alleged Federal question was first raised when the case reached Kansas City Court of Appeals, it was in time, and the judgment of *that* court may be reviewed here; notwithstanding under the Missouri practice the record must show that such question was presented for decision to the trial court before it can be considered on appeal. This overlooks the fact that the Kansas City Court of Appeals has no jurisdiction to *hear or decide* a case involving a Federal question.

The rule established by the Supreme Court of Missouri is, that unless the record expressly shows that such question was presented to and passed upon by the court of original jurisdiction, it is not in the case, and must be ignored and the case disposed of without reference thereto.

There has been no final judgment in the highest court of the state of Missouri in which a decision in the suit could be had, denying plaintiff in error any right, privilege or immunity claimed under the Constitution or laws of the United States. The Supreme Court of the state, which is the only appellate court by which such a question can be decided, declined to take jurisdiction of the case on the sole ground that no such question was raised or presented by the record, and therefore, it could not be passed upon or decided upon appeal.

The case of plaintiff in error does not stand upon the proposition that there has been a final judgment by the highest court of the state, in which a decision of the case could be had, adverse to any right or immunity specially set up or claimed by the Railway company; but on the ground that the Supreme Court, which alone could pass upon such question upon appeal, declined to do so because it was not properly in the case and hence the judgment of the Court of Appeals must stand without reference to any such question. The case therefore does not come within section 709 of the Revised Statutes of the United States.

II.

The exemption claimed from liability for counsel fees, on the ground that the bond sued upon was given in an equity proceeding in the Federal Courts, and that in those courts such fees are not allowed as damages on injunction bonds, and therefore cannot be allowed in a suit upon the bond in any other court, is not available, even if well founded, unless "specially set up or claimed."

Columbia Water Power Co. vs. Columbia Electric Street Railway, Light and Power Co. 172 U. S., 475.

Eastern Building & Loan Association of Syracuse vs. Welling, 181 U. S. 49.

Sayward vs. Denny, 158 U. S. 180.

Oxley Stave Company vs. County of Butler, 166 U. S., 648.

The case cannot be reviewed here upon the ground that a Federal question was necessarily presented upon the face of the pleadings—For aught that appears the railway company may have deemed it unnecessary to rely upon any such matter. The Court of Appeals of New York, in Corcoran vs. Judson, 24 N. Y., 106, allowed attorney's fees as damages upon an injunction bond given in the Federal courts. The defendant in that case does not seem to have alleged any exemption or immunity under Federal laws or to have made any such claim. He was not bound to do so. It may well be that the railway company thought its other defenses were sufficiently strong, and that Elliott was not entitled to recover upon the bond at all, and, therefore, it was not necessary "to specially set up or claim" any such alleged immunity under Federal laws. It is not sufficient to say that the Federal question was necessarily involved in the suit. The statute requires it *to be specially set up or claimed*. This court, in Eastern Building & Loan Association v. Welling, 181 U. S., 47, says:

"The assertion that although no Federal question was raised below, and although the mind of the State Court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless that it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved—is demonstrated to be unsound by a conclusive line of authority."

Quite a number of authorities are then cited in support of this proposition. The court then adds:

"The error involved in the argument arises from failing to observe that the particular character of Federal right which is here asserted is embraced within those which the statute requires to 'be specially set up or claimed.' The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred and especially in the latest case cited, to-wit: Columbia Water Power Co. vs. Columbia Electric Street & R. Light & Power Co."

III.

If, however, the question, was properly presented by this record, the judgment nevertheless was right. The State Court had jurisdiction of the suit upon the bond, notwithstanding the bond was given in a proceeding in a Federal Court. This is not an open question.

Meyers vs. Block, 120 U. S. 206.

The correct measure of damages was a matter of general law to be determined by the court where the case was tried. Reasonable attorneys' fees, necessarially incurred in the dissolution of the injunction are allowed under the rule in Missouri, and the trial court had the right to include same in the assessment of damages on the bond.

Meyers vs. Block, 120 U. S., 206.

1 Spelling on Extraordinary Legal Rem., 2nd Ed., Sec. 954.

Mitchell vs. Hawley, (Cal.) 21 Pac. Rep., 833.

Eastern Railway Co. vs. Brown, (Ky.) 36 S. W. Rep. 575.

Aiken vs. Leathers, (La.) 3 Southern Rep. 357.

Corcoran vs. Judson, 24 N. Y., 106.

Hannibal & St. Jo Railway Co. vs. Sheppard, 1 Mo. App., 254.

Walsh vs. Lackland, 8 Mo., App., 122.

Missouri, Kansas and Texas Railway Co. vs. Smith, 154 Mo., 300.

The Supreme Court of California, in discussing this question, used the following language:

"We cannot agree with counsel in the view that in an action brought in a court in this state, on an injunction bond given in a court of the United States, counsel fees can, in no instance, be recovered as damages, because such damages are not allowed by the Federal courts. Bondsmen, in such a case, cannot, be held to have contracted with the understanding that a suit would be brought upon the bond, if at all, in the Federal Court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California, which was probably the fact, an action on the bond could probably not be maintained in a Federal court at all."

The Court of Appeals of Kentucky, in Eastern Railway Co. vs. Brown, supra., said:

"This action is on an injunction bond and a demurrer sustained to the petition. The bond was executed in the United States Circuit Court for Kentucky, and by a mandatory injunction the appellant was compelled to deliver the appellee, Brown, an engine upon which it claimed a lien for repairs. It seems the state court had jurisdiction, although the bond was given in the Federal Court. Meyers vs Block, 120 U. S. 206, 7 Sup. Ct. 525. Under the rule in this court or in this state it is only where the enforcement of a judement has been enjoined that the court at the

time must ascertain the damages. Alexander v. Gish, 88 Ky. 13, 9 S. W. 801. The demurrer should have been overruled. Reversed and remanded, that this may be done."

The Supreme Court of Louisiana, in Aiken vs. Leathers, says that attorneys fees were allowed in the Block and Levi cases, which came to this court and were affirmed in Meyers vs. Block, 120 U. S. 206. The following quotation is taken from the opinion in Aiken vs. Leathers.

"As all the considerations which led that exalted tribunal to a denial of counsel fees, as an element of damages, refer to a demand assimilated to a claim for damages in an injunction suit proper, and to such a demand in chancery, we feel justified to conclude that the court did not intend to exclude such a demand in a suit at law, much less in an action filed in one of our state courts, in which there is no chancery, as distinguished from a jurisdiction at common law; or in a case in which a preliminary restraining order had been granted merely as ancillary to a principal demand for the cancellation of an important and valuable contract. These views are substantially confirmed by the reasoning used, and by the conclusions reached, by the Supreme Court in the cases of Meyers v. Block, and Meyers v. Levi, reported in 120 U. S. 206, 7 Sup. Ct. Rep. 525, which went up from this court on writs of error. In the decision of those cases the Supreme Court established a clear distinction between the issues involved therein and the question presented in the case of Bein v. Heath, 12 How. 168. In view of the great reliance placed by defendant's counsel herein on the latter decision, as sustaining the views alleged to have been announced in the case of Oelrichs v. Spain, we attach great importance to the decision in the Block case. In that case the obligors on the injunction bond, who were

therein sued on the bond, had made the point, which defendants substantially make here, that an action on a bond of injunction, given in equity, in and by order of a Federal Court, could not be entertained against the obligors on the bond in the courts, and subjected to the law and jurisprudence, of the State of Louisiana. And they had rested their argument on the authority of the case of Bein v. Heath, above referred to. After reviewing that case, and sustaining the various views therein announced, the court proceeded to demonstrate the difference between it and the Block case, saying; 'But according to our view, the bond sued on in the cases before us do not demand any such construction. It is plain that they could not be intended as security for any debt or *demand in litigation*, (italics are ours,) but as security only for the damages that might be sustained by the issuing of the injunctions. The condition is to pay 'all such damages as he (Isaacs in the one case, and Block in the other) may recover against us in case it should be decided that said writ of injunction was wrongfully issued.' Recover how? By the laws of Louisiana damages can be recovered for suing out an injunction without just cause, independently of a bond. Florance v. Nixon, 3 La. 291. But this cannot be done in the United States courts. Without a bond, no damages can be recovered at all. Without a bond, for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issued can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that

they will pay such damages as he may recover by a suit on the bond itself. Otherwise it is senseless and vain. Construed in this way, it is in strict conformity with the order which required it. It is in this way that the bonds in question were finally construed by the Supreme Court of Louisiana, and we think that its construction was right.' 35 La. Ann. 220.

"The condition of the bond in suit in the instant case was that the obligors would "well and truly pay to Aken all such damages that he may recover against us in case it should be decided that the injunction or restraining order was wrongfully obtained," which is almost in terms precisely similar to the conditions in the bonds construed in the Block-Levi Cases by the Supreme court of the United States. Now, a reference to the record of those cases shows that counsel fees were an element of damages, in the demand as well as in the proof. Hence we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action at law in a Federal Court, and a fortiori in a Louisiana court, for the recovery of damages on a bond of injunction given in and by the order of a Federal Court in an equity proceeding. Hence we hold that defendants' contention on that point is not supported by the authorities relied upon, and that it cannot be sanctioned in our jurisprudence."

The New York Court of Appeals allowed counsel fees in a suit upon an injunction bond given in the Federal Court, in Corcoran vs. Judson cited above.

The following is an extract from the opinion of the Supreme Court of the State of Missouri, in deny-

ing a writ of prohibition sought by the plaintiff in error in this case against the Kansas City Court of Appeals:

"It is thus to be seen that the main and principal question relied upon by defendant in that case in the trial court, as well as in the Kansas City Court of Appeals, was that the injunction in the United States Court, in the suit wherein the relator here was there complainant, and John S. Elliott was defendant, was only ancillary to the principal object of the action, and that the liability for counsel fees was incurred in defending the action generally, and that the dissolution of the injunction was only an incident to that result, and that counsel fees on the injunction bond are not properly recoverable for such services under such circumstances, but are so limited to such services only as are necessarily incurred in dissolving the injunction when that is the relief sought by the action. Upon that question, as thus raised and presented, the facts in the circuit court were found against the defendant (the relator herein) and as no Federal question was raised in its consideration or involved in its determination, and as the amount of the judgment rendered, on the determination of the question of facts, under the applicatory law was less than $2,500, the case on appeal was properly sent to the Kansas City Court of Appeals.

"But says the relator, conceding that the injunction bond given in the Federal Court was properly sued on in the Cooper county Circuit Court, and that the amount of judgment obtained thereon was such as to confer jurisdiction of the case on appeal in the Kansas City Court of Appeals, still the order of the Federal Court requires the bond in the first instance, the order filing it and making it a part of the record and proceedings of the Federal Court; the law of that court governing the liability under such

bonds, all became a part of the contract evidenced by the bond, and are involved in a suit upon that instrument, no matter in what court such suit may be instituted, and without regard to the fact whether the questions raised and considered were named or designated as federal questions or not; that authority exercised under the United States is necessarily involved and drawn in question by the suit on the injunction bond issued under the direction of the Federal Court, and that to ignore its mandates will not eradicate the question, or its existence.

"To us the contention of relator does not seem tenable. We fail to discover from the record anywhere, how "the validity of a treaty or statute of, or authority exercised under the United States is drawn in question," or that a Federal question may be said to have been involved in the case. In fact, both the petition and the answer in the case before the trial court, recognized the validity of the bond, and the action of the Federal Court in all its orders regarding or affecting the same. It is upon the bond as a valid instrument, issued by order of proper authority, that plaintiff's suit in the Circuit Court is predicted, and the relator's answer (as defendant) in that suit admits that it executed the bond under the facts as stated in the petition, and by way of defense thereto the relator simply answered that the injunction suit in which said bond was given, was a mere incident to a main suit then pending between the relator and said John S. Elliott, and that for dissolving the injunction under such circumstances attorney's fees are not allowable as an item of damages. That a Federal question could have been raised is not denied; but that such a question was not raised, is most manifest.

"If no challenge of authority exercised under the United States is in fact made by the record, the mere

assertion of its existence by counsel, coupled with the further fact that such a question might have been made under a proper answer, or by the development of a proper state of facts during the progress of the trial, will not suffice to deprive the Kansas City Court of Appeals of its jurisdiction to hear and determine upon the case as it reached that court, or to invest this court with jurisdiction thereof.

"Nor can we agree with counsel for relator in the proposition asserted, that the law or the rules of practice in the Federal Court, enter into and become a part of the contract evidenced by the bond taken therein, and to be treated and considered as if incorporated in it, and as forming a part of the contract, in a suit upon the bond in the State Court. The law of the land, the lex loci contractu, and not the rules of practice or the administration of the law in any given way in a particular jurisdiction when a bond is taken, must govern in suits upon such instruments. When the relator and his sureties signed the bond in the injunction proceedings in the United State Circuit Court at Jefferson City (instituted by itself as plaintiff against John S. Elliott as defendant) they contracted with the defendant therein to become liable for and to pay all sums of money, damages and costs, that shall be adjudged against the plaintiff, in those proceedings if the injunction should be dissolved—not merely such damages as under the rules and practice of that court are allowable therein, but all damages allowable by the law of the place where said bond is made and executed, as the same is administered in the courts of the situs of the bond.

A bond of this character, sued on in a state court, is to be interpreted by the rules that govern the consideration of a like instrument executed in the state courts, and while the obligors in this bond may be said to have known when they executed it, that in

the United States Court they would not be held liable to pay attorneys' fees, they must have also known, and did in contemplation of law know, that in a proceeding in our State Court upon like instruments, attorney's fees are allowable as one of the items of damages recoverable, when the injunction shall be dissolved by the labor and efforts of attorneys employed for that purpose, and that if the suit on the bond to be signed was begun, as in this case, in a state court, the rules of interpretation governing such obligations there would apply to this bond.

Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States Court, applicable to the liability of bondsmen on an injunction bond given in that court, can in anywise be drawn in question, so as to present a federal question in a suit in a state court on the bond, when its validity, as in the case of Elliott against the relator railway company, begun in the Cooper County Circuit Court and now pending on appeal in the Kansas City Court of Appeals, is admitted and where no question as to the court's authority to order the bond as given is or was made by the relator.

As said, the relator, as defendant in the suit now pending in the Kansas City Court of Appeals on appeal, contested the issue by an answer that in no way drew in question authority exercised under the United States, nor did it set up any claim or right by authority exercised under the United States, as abridged or taken away, nor did it deny that the state court, wherein the suit was instituted, had authoriy to hear and determine the case. The authority of the Cooper county Circuit Court to hear and determine the case in the first instance is conceded by counsel.

While there is no doubt upon the question as to the power of the Federal Court of equity to have imposed such terms as it chose as a condition to grant-

ing the injunction, it is equally true that when it had imposed conditions such as those stipulated in the bond in the suit (in the case of Elliott v. Railway Co., now in the Kansas City Court of Appeals, on appeal) that court had no authority under its rules of practice and procedure, to render a judgment for the damages occasioned by the conditions broken, on the dissolution of the injunction, but it must, as it did, leave the obligee then to proceed in a court of law for such damages as were occasioned to the defendant in that suit. As the obligee is driven of necessity to a court of law, to recover his damages on the dissolution of the injunction in the Federal Court of equity, the condition of the bond would be meaningless in many instances if only a Federal Court could hear and determine the issue involved. If in a Federal Court alone, such bonds could be sued on, when the obligor and obligee therein were citizens of the same state, the bond would become a meaningless nothing, as no right thereunder could be enforced in a Federal Court, on account of common citizenship.

The validity of no statute, treaty or authority exercised under the United States being drawn in question by the relator's answer in the suit on the bond in the Cooper County Circuit Court that would operate, under article 6, section 12 of the constitution of this state, to divest the Kansas City Court of Appeals of jurisdiction thereof, hence, no authority in this court by a writ of prohibition to order that court to stay proceedings therein or to transfer the case here for final disposition on that account, as asked by relator."

WILLIAM M. WILLIAMS.
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 148.—October Term, 1901.

The Missouri, Kansas & Texas Railway Company, Plaintiff in Error, *vs.* John S. Elliott.	In error to the Kansas City Court of Appeals for the State of Missouri.

[March 10, 1902.]

The action below was brought by Elliott in the State circuit court of Cooper County, Missouri, against the railway company, plaintiff in error herein. Recovery was sought upon an injunction bond given in an equity cause in a suit in the Circuit Court of the United States for the Central Division of the Western District of Missouri. The railway company was complainant in the equity cause and Elliott was defendant. The Circuit Court of the United States, as the result of a mandate of the Circuit Court of Appeals, entered an order dissolving the injunction, and thereupon this action was commenced. The damages which it was alleged were embraced in the condition of the bond were averred to consist of payments made for attorneys' fees, traveling and other similar expenses of the plaintiff, asserted to have been disbursed during the course of the litigation in the United States court.

The answer consisted of a general denial, and alleged that the equity suit in which the bond was given was made necessary to enable the defendant to make its defense to an action at law, which had prior to the equity suit been brought against the railway company by Elliott. The cause was tried by the court without a jury. It appeared on the trial that in dismissing the bill in the equity cause the statutory allowance to attorneys and other costs had been taxed, and paid by the complainants in the equity cause in the United States Circuit Court. No objection was interposed at the trial to evidence introduced for the plaintiff as to the value of attorneys' services and the other sums disbursed for the expenses alleged in the petition. At the close of the trial the court, over the objection of the defendant, declared the law to be that the plaintiff was entitled to recover his reasonable personal expenses and reasonable attorneys' fees incurred for the services of attorneys in procuring the dissolution of the injunction. The following, among other prayers asked by the defendant, were refused:

"2. The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on any sum which he may have paid out or become liable for as attorneys' fees."

"5. The court declares the law to be that the plaintiff, having received the amount taxed in his favor as attorneys' fees as part of the costs in the equity suit mentioned in the pleadings and evidence in this case, he cannot now recover anything on account of attorneys' fees in this case."

Judgment having been entered in favor of plaintiff and a motion for a new trial having been overruled, an appeal was taken to the Kansas City Court of Appeals, and the judgment was affirmed. In the course of its opinion the court recited the contentions of the defendant, and held each of them to be untenable. These contentions were thus stated by the court:

"1. Defendant's objections to the judgment below may be thus stated: First, that there was no breach of the conditions of the bond in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that defendant 'should pay all sums of money damages and costs that shall be adjudged against it,' &c.; and, *secondly, it is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts; that attorneys' fees are not there considered elements of damage in suits on injunction bonds, and that therefore our State courts should apply the same rule in suits on bonds given in the Federal courts;* and thirdly, it is insisted that the trial court erroneously allowed as damages attorneys' fees for defending the entire case—that the injunction was merely incidental to the principal case, and no attorneys' fees were paid to secure its dissolution."

A motion for a rehearing was thereafter filed, in which, among other things, it was contended that the cause involved a Federal question, "for the reason that the controversy in this suit arises under the authority of the United States, and under the laws of the United States governing and applicable to United States courts," and the court was asked in the event that it should refuse to grant a rehearing, to transfer the case to the Supreme Court of the State of Missouri, "for the reason that a Federal question is involved, and because the subject of the controversy of this suit arises under the authority of the United States and under the exercise of such authority, and under the laws of the United States governing and controlling the courts of the United States and the proceedings therein." The motion for a rehearing having been overruled, it appears from a stipulation contained in the record that an application was made to the Supreme Court of the State of Missouri for a writ of prohibition against the judges of the said Kansas City Court of Appeals to restrain the further exercise of jurisdiction in the cause, and to require the record and proceedings to be certified to the Supreme Court. This application was denied. (154 Missouri, 300.)

Thereupon the present writ of error was allowed and the record of the cause was brought here from the Kansas City Court of Appeals.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the Court.

The proposition relied upon to secure the reversal of the judgment below is that the State court erroneously allowed as an element of damage upon an injunction bond given in a court of the United States the sum

of alleged counsel fees for procuring a dissolution of the injunction, and that as such fees under the rule prevailing in the equity courts of the United States are not properly allowable, therefore the State court denied an immunity asserted in favor of the defendant below and arising from an authority exercised under the United States.

We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City Court of Appeals. It is contended on behalf of the defendant in error that the Federal question relied upon was not raised below, and therefore is not reviewable here.

The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the State court intended to and did assert such a Federal right in the State court. But it is equally true that even although the allegations of Federal right made in the State court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the State court, yet if the State court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then a Federal controversy having been actually decided the right of this court to review obtains. (*Oxley Stave Co.* v. *Butler*, 166 U. S. 648, 660.) All that is essential is that the Federal questions must be presented in the State court in such a manner as to bring them to the attention of that tribunal. (*Chicago &c. Ry. Co.* v. *Chicago*, 166 U. S. 226.) And of course where it is shown by the record that the State court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the State court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised and it is actually considered and decided by the State court, the right to review exists. (*Mallett* v. *North Carolina*, 181 U. S. 589, 592.)

Now it plainly appears that the Kansas City Court of Appeals considered that there was presented to it for decision the question whether, in an action brought in a State court on an injunction bond given in a court of the United States, the State court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, viz., that attorneys' fees are not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City Court of Appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority

exercised under the United States, reviewable in this court, we have recently decided in *Tullock* v. *Mulvane*. True it is that the Kansas City Court of Appeals held, contrary to the rule announced in the Tullock case, that the State court was not bound to apply the rule of damages prevailing in the courts of the United States, and in effect while so concluding decided that the claim that the bond should be enforced according to the rule prevailing in the courts of the United States, involved no Federal question. But the fact that the State court, whilst deciding the Federal question, erroneously held that it was not a Federal one, does not take the case out of the rule that where a Federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of Federal right had been actually decided could be reviewed here if the State court, in passing upon the question, had also decided that it was non-federal in its character. The assertion that a Federal right was not raised below is therefore without merit.

It is, however, insisted that as the writ of error in this case was directed to the Kansas City Court of Appeals, there is no jurisdiction, because if there was a Federal question presented that court was not, under the constitution of the State of Missouri, the highest court of the State in which a decision on such question could have been had.

The Kansas City Court of Appeals was created by an amendment to the constitution of Missouri adopted in 1884. (Rev. Stat. of Missouri, 1899, vol. 1, p. 92.) By section 4 of the amendment the said court was given the same jurisdiction over lower courts within certain territory—embraced within which was Cooper County—as was possessed by the St. Louis Court of Appeals. As provided by a prior constitution, that of 1865, and continued by the constitution of 1875, the St. Louis Court of Appeals was a court of general appellate jurisdiction, but its judgments were not final in certain cases, among which were: *a*, cases where the amount in dispute, exclusive of costs, exceeded the sum of $2,500; *b*, cases involving the construction of the Constitution of the United States or of the State of Missouri; *c*, cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in question;" as well as in other enumerated cases, not necessary to be particularly referred to. In such cases, where the jurisdiction of the St. Louis Court of Appeals was not final, the judgment of the St. Louis Court of Appeals was reviewable by the Supreme Court of Missouri. (Ib. art. VI, sec. 12, p. 87.)

By the amendment to the constitution of 1884, by which the Kansas City Court of Appeals was created, in cases where the action of the St. Louis Court of Appeals had been theretofore reviewable by the Supreme Court of Missouri, it was provided that the St. Louis Court of Appeals

should no longer have appellate jurisdiction, but that writs of error, in such cases, should run directly from the Supreme Court to the trial courts, and this provision was made applicable to the Kansas City Court of Appeals which the amendment created. By the amendment in question superintending control over the trial courts in such cases was conferred upon the Supreme Court. (Ib. sec. 5, p. 93.) It thus resulted that the Kansas City Court of Appeals, within the area of territory over which its jurisdiction extended, had no appellate jurisdiction in cases where the amount in dispute, exclusive of costs, exceeded $2,500, and where the cases involved the construction of the Constitution of the United States or of the State, and cases where was drawn in question the validity of a treaty or statute of or authority exercised under the United States, and in other cases not necessary to be mentioned.

By the amendment to the constitution of 1884, the Supreme Court of Missouri was expressly, moreover, given general superintending control over the courts of appeal, by mandamus, prohibition and certiorari. (Ib. sec. 8, p. 93.)

After the Kansas City Court of Appeals had affirmed the judgment of the Cooper County circuit court, the railway company filed a motion for a rehearing, and prayed therein that in the event a rehearing was not granted the case should be transferred to the Supreme Court of Missouri. The motion for the transfer of the case to the Supreme Court was pressed upon two grounds, the second of which was, in substance, that the decision of the cause involved a Federal question, of which the Supreme Court of Missouri should take exclusive cognizance, because of its appellate jurisdiction, "in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question."

The court, in overruling this motion, necessarily decided that the case came within its appellate jurisdiction and not within the exclusive appellate power conferred by the Constitution on the Supreme Court of the State. This doubtless rested upon the predicate upon which the court had based its opinion, which was not that the issue whether attorneys' fees could be allowed upon the bond given in the Federal court had not been raised but, because, although that question had been raised and been decided, it was not one of the class of questions within the purview of the exclusive jurisdiction of the Supreme Court of the State. And this seems to us to be the view held by the Supreme Court of Missouri, when, in consequence of the refusal to transfer the cause to it, its superintending power over the Kansas City Court of Appeals was invoked through the medium of the application for writs of prohibition and certiorari. We so conclude, because, although in its elaborate opinion overruling the application for the writs named, the Supreme Court declared that the question of the power of the State court to award attorneys' fees

on the injunction bond given in a court of the United States, contrary to the rule of damages prevailing in the courts of the United States, had been raised in the case and had been decided by the Kansas City Court of Appeals, the writs of prohibition and certiorari would not be allowed, because such a question was not within the appellate jurisdiction of the Supreme Court of Missouri, but was within the jurisdiction of the lower appellate court. After fully stating the contention below and its decision by the Kansas City Court of Appeals, the Supreme Court of Missouri said:

"We fail to discover from the record, anywhere, how the validity of a treaty or statute of, or authority exercised under the United States is drawn in question, or that a Federal question may be said to be involved in the case."

In other words, as the exclusive appellate jurisdiction of the Supreme Court of Missouri over cases which, by the amount involved, would otherwise have gone to the Kansas City Court of Appeals, was conferred only in special cases, among other cases involving the construction of the Constitution of the United States and cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in question," the court held that as the validity of the bond given in the Circuit Court of the United States was not questioned, no claim made by the defendant of immunity under an authority exercised under the United States was embraced within the exclusive appellate jurisdiction conferred by the Constitution upon the Supreme Court of Missouri, and therefore such question had been properly determined by the Kansas City Court of Appeals. We are constrained to this construction of the opinion of the learned court from the fact that it elaborately discusses and demonstrates that the defense of immunity from liability for attorneys' fees under the bond given in a court of the United States was not an attack on the validity of the bond, and therefore not within the cognizance of the Supreme Court of Missouri, and from the further fact that in the course of the opinion the court said:

"Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States court, applicable to the liability of bondsmen on an injunction bond given in that court, *can in anywise be drawn in question, so as to present a Federal question*, in a suit in a State court on the bond, when the validity of the bond, as in the case of *Elliott* v. *Railway Co.*, begun in the Cooper County circuit court, and now pending on appeal in the Kansas City Court of Appeals, is admitted, and where no question as to the court's authority to order the bond as given is or was made by the relator."

It results, therefore, under the view we take of the opinion of the Supreme Court of Missouri, the court decided that as the case presented merely a claim of immunity under an authority exercised under the United States, and did not involve, to quote the language of the Missouri consti-

tution, the drawing in question "the validity of an authority" so exercised, therefore, the Kansas City Court of Appeals was vested under the constitution and laws of Missouri with final jurisdiction. But if, however, we were to give to the opinion of the Supreme Court of Missouri the contrary construction, the finality of the judgment of the Kansas City Court of Appeals in this case would be none the less apparent. It is manifest, we conceive, from the opinion of the Supreme Court of Missouri, that if it had been deemed that a Federal question not within the cognizance of the Kansas City Court of Appeals had been decided by that court, the superintending power of control conferred by the State constitution on the Supreme Court of Missouri would have been exerted for the purpose of preventing the Kansas City Court of Appeals retaining jurisdiction of the cause. If, then, the action of the Supreme Court of Missouri can be held not to have been rested on the phraseology of the Missouri constitution, including within the exclusive appellate power of the Supreme Court of Missouri not claims of immunity arising from an authority exercised under the United States, but only cases where was drawn in question the validity of an authority exercised under the United States, then the necessary effect of the action of the Supreme Court of Missouri was this, that because it held to the opinion that it was impossible for a Federal question ever to arise from a claim of immunity resulting from the exercise of an authority under the United States in the giving of an injunction bond in the courts of the United States, therefore, under the constitution and laws of Missouri, the action of the Kansas City Court of Appeals was final.

It being then demonstrated that whatever view may be taken of the opinion of the Supreme Court of Missouri, that court necessarily decided that the Kansas City Court of Appeals, in passing upon the claim of immunity, was the final court in Missouri where such question could be decided, it follows that the writ of error properly ran to the Kansas City Court of Appeals, and the claim of the absence of jurisdiction is without foundation.

Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in *Tullock* v. *Mulvane*, before referred to, that there was error committed by the Kansas City Court of Appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

The judgment of the Kansas City Court of Appeals must be reversed and the cause remanded to that court with directions for further proceedings in conformity with this opinion.

And it is so ordered.